UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD
BEFORE THE DIVISION OF JUDGES

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 251, Respondent, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 25, Respondent and DHL EXPRESS (USA), INC., Charging Party.	Case Nos. 01-CB-219768 01-CC-219536 01-CC-219746

CHARGING PARTY DHL EXPRESS (USA), INC.'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Robert A. Fisher
Skelly Harper
SEYFARTH SHAW LLP
Seaport East
Two Seaport Lane, Suite 300
Boston, MA 02210
TEL: (617) 946-4800
FAX: (617) 946-4801
rfisher@seyfarth.com
nharper@seyfarth.com

Counsel for Charging Party DHL Express (USA), Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Charging Party DHL Express (USA), Inc. ("DHL Express") submits this post-hearing brief in support of the allegations of the Amended Complaint. The evidence presented at the hearing demonstrates that Respondents International Brotherhood of Teamsters, Local 251 ("Local 251") and International Brotherhood of Teamsters, Local 25 ("Local 25") (collectively, "Respondents" or "the Unions") violated Sections 8(b)(4)(B) and 8(b)(1)(A) of the Act. There is no dispute that on May 1, 2018, the Unions jointly set up picket lines at two DHL Express facilities in the Boston area in furtherance of a labor dispute between Local 251 and DHLNH, LLC ("DHLNH"), a subsidiary of North East Freightways ("NEF"). The picketing was intended to cause and did cause DHL Express employees to engage in a work stoppage. While Respondents denied in their Answers that the picketing had a secondary object, Respondents' email communications about planning the picket lines and their social media posts the day of the picketing establish otherwise. The Unions sought to "shut down" DHL Express in support of their demand that DHLNH provide Teamster health and pension. Further, there is no dispute that picketers blocked entrances and egress at DHL Express's Boston Station ("BOS"), absent intervention by the police.

Nor can there be any dispute that counsel for the General Counsel established that DHL Express was a neutral to the labor dispute between Local 251 and DHLNH. *See SEIU Local 525*, 329 NLRB 638, 639 n.15 (1999). The evidence shows that DHL Express has neither common ownership, common management, nor centralized labor relations with either NEF or DHLNH. DHLNH and NEF are based in New Hampshire. Phillip Palker ("Palker") owns NEF and DHLNH; he and his son Canaan Palker ("Canaan") manage and control the labor relations of NEF and DHLNH; and both are actively involved in resolving grievances and collective bargaining for DHLNH. Accordingly, DHLNH and Local 251 had bargained for nine months over the terms of

an initial contract, reaching agreement on many terms. Local 251 called a strike against DHLNH on April 30, 2018, because the Palkers would not agree to Local 251's wage proposal and, on principle, refused to contribute to Teamster health and welfare plans. Thus, the only labor dispute was between Local 251 and DHLNH, and DHL Express was a neutral to that dispute.

Because the facts alleged in the Amended Complaint and proven at trial establish violations of the Act, Local 251 relies upon several affirmative defenses: (1) that DHL Express is a joint employer; (2) that DHL Express is a franchisor to DHLNH as franchisee; and (3) that DHL Express is an ally to DHLNH.[1] Board law is clear that Local 251 bears the burden of proof on its affirmative defenses. *See SEIU Local 525*, 329 NLRB 638, 639 n.15 (1999). Local 251's repeated insistence at trial that it did not have the burden of proof establishes what the record reveals — that the defenses are without merit.

Local 251's claim that DHL Express was a joint employer with DHLNH runs aground on the law and the facts. Local 251 concedes that its joint employer defense rests on the test set forth in *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (2015), rather than the test overruled in that case. However, a majority of the Board has made clear the test in *Browning-Ferris* is wrong and that the Board should return to its traditional test for joint employment -- whether the putative joint employer has actual control over terms and conditions of employment. *See Orchids Paper Products Co.*, 367 NLRB No. 33, p. 4 n.14 (2018). Regardless of which test should apply, Local 251 should be estopped from claiming that DHL Express was a joint employer at the time of the picketing, as it deliberately pursued a bargaining relationship with just DHLNH.

---

[1] Local 251 also alleged that any violation of the Act is de minimis, but as the Judge recognized, this is not a valid defense.

Local 251 undisputedly dropped any joint employment claim in 2017 as part of the processing of its representation petition. Thereafter, it engaged in bargaining solely with the actual employer, DHLNH. DHL Express was never at the table and played no role in bargaining. It was only after the filing of the charge in this case that Local 251 sought to resurrect its joint employer claim. Even then, Local 251 ultimately negotiated a complete first contract with the actual employer, DHLNH. That undisputed history should be the end of the issue.

Local 251's shifting explanations for its pursuit of a bargaining relationship solely with DHLNH serve to demonstrate that it should be estopped from claiming joint employer status here. At the outset of the hearing, Local 251 claimed that it dropped DHL Express as an employer during the representation proceeding, because DHL Express would not stipulate to an election. Because that explanation demonstrated that it made a knowing choice to pursue a bargaining relationship only with DHLNH, it backpedaled from that story and asserted a new one — that it dropped DHL Express from the representation proceeding because the evidence was insufficient to support a joint employer defense. But Local 251 presented no evidence to suggest that it learned any additional facts in bargaining to alter that conclusion. In addition to raising significant credibility issues, these conflicting claims reinforce the conclusion that Local 251 never believed that DHL Express was an employer.

But even if Local 251 can get around its own conduct and even if the Board would continue to apply the test set forth in *Browning-Ferris,* Local 251 failed to present sufficient evidence of a joint employer relationship. Apparently hoping to find something to support the claim, Local 251 served a massive subpoena *duces tecum* on DHL Express. In support of that subpoena, Local 251 insisted that DHL Express controlled every term and condition of employment of the DHLNH employees. After DHL Express produced thousands of pages of documents in response to the

subpoena, Local 251 was forced to retrench. At the hearing, it conceded that DHLNH set the terms and conditions of employment, and instead argued that DHL Express somehow had reserved control. But unlike in *Browning-Ferris*, DHL Express has no contractual right to approve or veto changes to wages and benefits, to control which employees are hired or when employees are fired, to dictate the pace of work, or to approve or veto overtime. Stripped of argument, the evidence presented regarding the relationship between DHL Express and NEF establishes the type of business relationship protected by Section 8(b)(4), not joint employment.

The same is true as to Local 251's franchisor-franchisee defense. As the Judge recognized at the outset of the case, this is not a real defense. Indeed, Local 251 seemingly abandoned it at trial. It presented no evidence of any franchisor-franchisee relationship.

Lastly, Local 251 alleges that DHL Express had become an ally to DHLNH, thereby losing its neutral status. Not only did the evidence at trial fail to demonstrate even an arguable claim of ally status, Local 251's principal officer all but conceded that the claim was fabricated. Taken together, these defenses are not valid, and the Judge should conclude that Local 251 therefore violated the Act as alleged.

The same conclusion should be reached as to Local 25. Tellingly, it never claimed in its answer that DHL Express was a joint employer or ally. Instead, it insisted that it was an innocent bystander, but the evidence demonstrates that it was neither innocent nor a bystander. Local 25 helped Local 251 plan the picketing and ensured that the picketing would occur at times that would have the maximum impact. Indeed, Local 25 wanted the picketing to occur at a third location (Hartford) to ensure that all three locations were shut down at once. During the picketing, Local 25 sought to ensure that the DHL Express employees did not cross the picket line and go to work.

It also sought to prevent a third-party cargo truck from JFK airport from pulling in at DHL Express's Boston station.

In sum, the Respondents jointly violated the Act. Together, they planned to induce a work stoppage by the DHL Express employees at Boston and Westborough stations. As planned and intended, the DHL Express employees represented by Local 25 withheld their services until directed by Local 25 to return to work. During the work stoppage, Local 251 agents patrolled in front of entrances with signs, which is picketing and both 8(b)(4)(ii) and 8(b)(4)(i) conduct. *Teamsters Local 122*, 334 NLRB 1190, 1191 & n.8 (1991). Local 25 agents independently engaged in 8(b)(4)(i) conduct by standing nearby and also by orally signaling their support for a work stoppage. *Int'l Bhd. of Elec. Workers, Local 98*, 327 NLRB 593 (1999); *Iron Workers Pac. NW. Council (Hoffman Const.)*, 292 NLRB 562, 585 (1989). In addition, as there was a joint plan with the common object of causing the work stoppage by Local 25 members, Respondents are responsible for the conduct of each other's agents. *See Elec. Workers, IBEW*, 150 NLRB 363, 373 (1964). At the Boston station, Respondents also violated Section 8(b)(1)(A) of the Act by blocking entrances and exits to the facility. *Int'l Union of Operating Engineers, Local Union No. 17*, 335 NLRB 578, 583 (2001).

FACTS

I. The Parties

A. DHL Express And The DHL Express Employees Represented By Local 25

DHL Express is in the business of providing international pickup and delivery services for customers. Tr. 312, 670 (explaining that DHL Express eliminated domestic-to-domestic shipping

about 10 years ago).[2] It has a United States headquarters in South Florida and international headquarters in Germany. Tr. 312.

DHL Express has organized its operations into geographic areas. The Northeast Region covers operations from Maine down to Washington D.C. and out to central Pennsylvania. Tr. 291, 312-13, 1213. Laurice Bancroft ("Bancroft") is the General Manager for the Northeast Region and responsible for operations in that area. Tr. 291, 310-13, 370, 1213. Seth Evans ("Evans") was the Controller for the Northeast Region and responsible for managing and forecasting profit and loss in that area. *Id.* Area Operations Manager Jeffrey Sidorski ("Sidorski") is responsible for operations throughout New England. Tr. 370, 1168, 1203.

Within the Northeast Region, DHL Express maintains twenty-nine service stations. Tr. 312. The service stations are responsible for processing inbound and outbound freight. Tr. 312-13. In the morning, inbound freight is unloaded from planes, processed and then delivered to businesses and residences. Tr. 312-13, 564. In the evening, outbound freight is picked up, processed and loaded onto trucks and planes. Tr. 312-13. Twelve of the stations in the Northeast are referred to as independent contractor stations, meaning that in those locations, DHL Express contracts with a third party to manage pickup and delivery operations in that footprint. Tr. 313. The remaining seventeen stations are company-operated stations. *Id.*

DHL Express operates a company station in Boston, Massachusetts and another in Westborough, Massachusetts. The Boston station, referred to as "BOS," is located at 420 E Street, South Boston, Massachusetts. Tr. 129. "MXG" or the "Westborough Station" is located at 9 Otis

---

[2] The Transcript is cited to herein as Tr. __, General Counsel Exhibits as GC-__, Charging Party Exhibits as CP-__, Local 251 Exhibits as L251-__, and Local 25 Exhibits as L25-__.

Street, Westborough, Massachusetts.[3] Tr. 223-24. DHL Express employs a station manager at each station, who has overall responsibility for their respective facilities. Tr. 205, 220, 291-92, 623. DHL Express employs shift supervisors who oversee the operation at a particular station during either the morning or evening operation. Tr. 129, 137, 222-23, 515-16.

For at least fifteen years, Local 25 has represented DHL Express employees at BOS. Tr. 531, 622-26, 668, 691-93. Sean O'Brien ("O'Brien") is the Principal Officer of Local 25 and the Principal Officer of Teamsters Joint Council 10, which includes all Teamsters locals in New England. Tr. 626, 699. Local 25 represents about 80 couriers (also called drivers) and about six clerical agents at BOS. Tr. 134-35. Since 2016, Local 25 has represented about 30 couriers and three clerical employees at MXG. Tr. 134-35, 222-23, 314-15, 531, 622, 666.

The DHL Express employees represented by Local 25 are covered by a "National Master Agreement." That Agreement is negotiated nationally by DHL Express and the Teamster DHL National Negotiating Committee ("the TDHLNNC") and administered by the Express Division of the International Brotherhood of Teamsters. Tr. 667-68; GC-19; GC-20. The Express Division is responsible for bargaining with DHL Express or companies that do business with DHL Express, known as independent contractors. Tr. 947-48. While all of the employees covered by the National Master Agreement constitute a single bargaining unit, DHL Express and TDHLNNC also negotiate various "Supplements" and "Riders" that apply only to certain classifications, certain locations, or certain classifications in certain locations. GC-20, Article 2, Section 3.

At all material times, Bill Hamilton ("Hamilton") has been the chair of the TDHLNNC. Tr. 668, 948. Hamilton is also a regional vice president and the Director of the Express Division

[3] MXG shares a building with a personal training gym and a construction company. The building is set back from the road at the end of a long driveway. Tr. 224-25, 531; GC 8.

of the International Brotherhood of Teamsters. Tr. 948. For fifteen years, Local 25 Business Agent John Murphy ("Murphy") has had responsibility for representing the Local 25 members employed by DHL Express and also has served as a member of the TDHLNNC. Tr. 531, 622-26, 668, 691-93.

DHL Express maintains a labor relations staff responsible for dealing with Local 25 and the TDHLNNC. Joseph Yates ("Yates") is the head of labor relations at DHL Express. Tr. 707-08. Locally, DHL Express employed Bob Connolly ("Connolly") as labor relations director in BOS until his retirement. Tr. 623-26, 674. At the time of the picketing, Murphy had the email addresses and phone numbers for Connolly and at least the email address for Yates, as well as email addresses and telephone numbers for the station managers at BOS and MXG (Anthony Baglio and Tom McArdle, respectively). Tr. 624-25, 674-75.

At the time of the picketing in this case, Local 25 had no relevant labor dispute with DHL Express. GC-1(q) ¶ 10. In the spring of 2018 and prior to the picketing at issue in this case, DHL Express and the TDHLNNC reached new agreements that were retroactive to 2017 and effective through 2022. Tr. 391-92, 668; GC-19. In New England, the clerical employees represented by Local 25 were covered by the National Master Agreement and a "Local 25 Office Clerical Local Rider." GC-25; GC-26. Drivers and dockworkers represented by Local 25 were covered by the National Master Agreement, as well as a national Pick-Up and Delivery Operational Supplement and a New England Pick-Up and Delivery Regional Supplement. Tr. 391-92; GC-22, Article 34. Those agreements also covered the same categories of employees in Hartford who are represented by Local 671. *Id.*; Tr. 618, 681; CP-3. The Principal Officer of Teamsters Local 671 is Dave Lucas. *Id.*

B. NEF-DHLNH And The Cartage Agreement

In 2013, DHL Express opened Providence Station or "PVD", which is located at 101 Concord Street, Pawtucket, Rhode Island. Tr. 1147; L251-78. DHL Express has employed four individuals at the Providence Station since that facility opened, three clerical employees and a supervisor, Glenn Marzelli ("Marzelli"). Tr. 315-16, 670, 1089-92.

As to pickup and delivery services, PVD is an independent contractor station. Tr. 291, 312-13, 1213. Since March 2009, meaning before DHL Express opened the current PVD station,[4] DHL Express has contracted with North East Freightways ("NEF"), formerly known as New England Freightways, to provide local pickup and delivery services in the PVD service area, as well as in Manchester, New Hampshire, Maine, and upstate New York. L251-74; Tr. 175, 283, 315, 349, 818, 1148, 1216.

Phillip Palker is the owner of NEF. Tr. 316, 1127. Palker owns and operates another company called DHLNH, which directly employs the drivers it utilizes to provide services in the PVD service area. *Id.* According to Local 251, DHLNH is a "wholly owned subsidiary" of NEF. GC-30. Both NEF and DHLNH are based in Hooksett, New Hampshire, where Palker resides. Tr. 1046, 1138. Both entities are commonly managed, as well as commonly owned. Palker's son, Canaan Palker ("Canaan"), is an executive of both entities and is involved in the management of the operations in the PVD service area. L251-71; Tr. 929, 1129. The entities also employ an "Area Manager," Ben Adkins, and a human resources representative, Daphne Dodge. L251-79; Tr. 1125.

---

[4] DHL Express had closed an earlier station in Providence about ten years ago in connection with the decision to eliminate domestic-to-domestic shipping. Tr. 670, 1056, 1092; CP 4, p. 2. At the time, the only DHL Express employees at the station — the clerical agents — were laid off. Tr. 1092.

Palker also owns Land Air Express ("Land Air") and Precision Delivery Systems or "PDS." Tr. 1127-28. Land Air has multiple facilities in New England and provides services related to overnight shipment. *Id.* PDS is a less-than-load carrier. *Id.* The businesses owned by Palker serve various customers other than DHL Express. *Id.*

Palker's companies maintain a single employee handbook for its employees, including the drivers at PVD. Tr. 579-80; GC-41. The introduction to the handbook, signed by Palker, welcomes new employees to "North East Freightways/ Land Air Express." GC-41, p. 4. The handbook sets out rules regarding terms and conditions of employment, including absenteeism, employee conduct and performance, personal appearance, use of company vehicles, substance abuse, security, non-discrimination and harassment, compensation, hours of work, breaks, paid holidays, benefits, vacation team, leaves of absence, use of company email, and separation from employment. *See* GC-41. Employees are required to sign an acknowledgement form that they have received the handbook, read it, and fully understand its terms. GC-41. The employee also acknowledges that only "the Owner/President" of NEF can alter the at-will employment relationship. GC-41.

The Cartage Agreement sets out the terms of the business relationship between DHL Express and NEF. L251-74. The Cartage Agreement defines NEF as the Contractor, and specifically states:

> 3.14 Independent Contractor Status. In making and performing this Agreement, the parties are acting, and shall act, as independent contractors. Neither party is, nor will be deemed to be, an agent, legal representative, joint venture, franchisor, franchisee or legal partner of the other party for any purpose. . . .

L251-74, pp. 1, 5-6. Further, the Cartage Agreement provides that the employees of NEF are "not employees of DHL and are not entitled to participate in or receive any benefits or rights as

employees of DHL, under any employee benefit and welfare plan, including, any employee insurance, pension, savings or security plan." *Id.*, p. 6.

Schedule B to the Cartage Agreement provides that NEF is responsible for "provid[ing] pickup, transport and delivery of DHL packages within" a service area (as relevant here, the PVD service area). *Id.* at Schedule B. In order for DHL Express to maintain high quality service and communications with its customers and to ensure a uniform level of service throughout the United States, NEF is expected to meet certain minimum specifications as set forth in Schedule B. *Id.* NEF's provision of services is non-exclusive, as its employees can provide "any cartage or related services for any other person or entity" other than DHL Express's "direct competitors in international express transportation." L251-74, Section 3.12.

NEF has "the sole right to determine all aspects of its performance of its obligations under this Agreement, including the staffing, operation, and routing." L251-74, Section 3.3. NEF is responsible, at its own cost and expense, "to obtain, furnish, operate and maintain in good working condition" such vehicles as "may be necessary for Contractor to perform the Services." *Id.* at Section 3.5.1. Relatedly, NEF has the "sole discretion and control" regarding the number of vehicles to be used each day in performing the required services. L251-74, Section 3.10. NEF is also solely responsible for "determining, providing and assigning a sufficient number of" workers to provide the services. *Id.* at Section 3.4.1. Further, NEF is "solely responsible for the interviewing, hiring, training, disciplining, and termination of [its] employees." *Id.*, Section 3.15.

Schedule A sets forth the compensation paid by DHL Express to NEF for its services under the Cartage Agreement. CP-24. DHL Express pays a flat rate for each pickup or delivery stop and a flat rate for each piece picked up or delivered. CP-24. It also provides a flat rate for a set number of vehicles, "regardless of the actual number of vehicles used" to perform the work. *Id.*;

Tr. 1245-47. DHL Express also pays NEF a weekly "Flat Rate" and "Dock" amount. CP-24. While the Cartage Agreement notes that "it may from time to time be appropriate to adjust the Fees," it provides no right to an adjustment. L251-74, Sections 5.4.1, 5.4.4.

Part of the payments is intended to compensate NEF for "an advertising service." L251-74, Section 7.3. NEF vehicles used in the performance of the services are expected to be branded with the DHL Express logo and the red-and-yellow color scheme. L-251 74, Sec. 7.1. However, NEF is required to "conspicuously disclose" that it is an independent contractor. *Id.* at Sec. 7.2. In practice, customer-facing vehicles operated by NEF utilize DHL marks and color scheme, but are also marked as "operated by" "N.E. Freightways." Tr. 873-74, 1159-60, 1225; L251-24; L251-25 NEF vehicles that are not customer-facing do not have DHL Express branding, such as a white tractor trailer that is marked "N.E. Freightways." Tr. 918, 925, 930-32, 1224-25. Similarly, NEF employees are required to wear DHL uniforms, as well an identification badge. L251-75. The badge must disclose that the employee works for a contractor. *Id.* In practice, the badges are a different color than DHL Express badges and state that the employee is employed by "N.E. Freightways." Tr. 1236, 1091-92. DHL Express does not issue identification badges to the DHLNH couriers.[5] Tr. 1236-37.

The Cartage Agreement provides for a one-year term, which automatically renews for subsequent one-year terms. L251-74, Section 9.1. The Agreement provides under what circumstances the parties may terminate the agreement and provides for a dispute resolution process. L251-74. In practice, if DHL Express believes that NEF has not complied with the

[5] DHL Express did arrange for Massport to issue a Massport badge for access to the airport ramp to one DHLNH driver in the bargaining unit, Walter Delesantos. However, months before the picketing, NEF became responsible for having its own Massport badge coordinator and obtaining Massport badges for NEF and DHLNH employees directly. Tr. 1197, 1237; L251-94.

Cartage Agreement, it can send a "business to business" or "B2B" letter to Palker. Tr. 345, 1213-14, 1259; CP-23. If such a letter does not resolve the dispute, DHL Express can escalate the matter by asserting that NEF is in "breach of contract." Tr. 1215.

In accordance with its provision of services under the Cartage Agreement, DHLNH employs three supervisors and about thirty drivers out of PVD.[6] CP-19. Antonio Santiago ("Santiago") is employed by DHLNH as a manager, along with two shift supervisors who report to Santiago. Tr. 817, 895, 930, 1060, 1219. Tim McLynch and Sam Thet held those positions as of the hearing. *Id.* Vanak Keough is a former DHLNH shift supervisor. *Id.*

C. DHL Express Must Assign Certain Processing Work To The Local 25 Unit

Although NEF provides local pickup and delivery services in the Providence area, the processing of PVD freight through Logan Airport or from JFK airport, whether inbound or outbound, is bargaining unit work of the Local 25-represented employees.[7] Tr. 271, 453, 690. Inbound freight destined for PVD flies into the United States either at JFK Airport in New York or at CVG airport outside Cincinnati. Tr. 170, 176. From CVG, the freight is carried by airplane to Logan Airport in Boston. Tr. 177-78, 268. From JFK, one "JFK truck" — a white vehicle operated by a third party called "Cargo Transport" — carries containerized freight to BOS to be delivered out of the Boston Station or Manchester. Tr. 138-39, 156, 169-171. Another JFK Truck

---

[6] DHL Express managers uniformly testified that they always viewed the relevant entity as NEF, not DHLNH. There is no evidence in the record as to when DHLNH began to employ the drivers. Nor is there any evidence as to why Palker chose to use the letters "DHL" in the name.

[7] In an arbitration between DHL Express and Local 25, an arbitrator confirmed that "the work of processing and transporting the [Providence and Manchester] freight in Boston [was] bargaining unit work," and that freight "transported directly to and from Logan Airport" must be "processed by Boston bargaining unit employees." Tr. 688-90; CP-4, pp. 3, 7. In December 2015, another arbitrator held that the PVD and Manchester freight "must first pass through the Boston geographic footprint" before being moved to Manchester Station or Providence Station. Tr. 688-90; L251-48, p. 5.

— also operated by Cargo Transport — carries containerized freight from JFK Airport to MXG to be delivered out of MXG or PVD. Tr. 267-68.

The JFK truck to BOS normally arrives at the Boston Station around 5:00 a.m. Tr. 138-39. Upon its arrival, the BOS containers are pulled off of the truck by Local 25 members. Tr. 171. On every day of the week other than Tuesday, containers destined for Manchester stay on the JFK truck, which then proceeds directly to "MHT" or the Manchester Station. Tr. 173-74. On Tuesdays, Local 25-represented DHL Express employees unload all containers, drive by truck the freight for Manchester to Logan Airport, and then load the freight on to an NEF truck. An NEF employee then drives the truck to Manchester. Tr. 171-72. The JFK truck to Westborough arrives at around 6:30 a.m. Tr. 271-73. Upon its arrival, Local 25-represented employees remove the MXG freight and the truck continues on to PVD. Tr. 271-73.

As to the plane from Cincinnati, Local 25-represented DHL Express employees handle and process inbound freight for PVD and MHT at Logan Airport. The flight from CVG arrives at Logan Airport around 7:30 a.m. and contains both containerized freight and "the belly load," meaning comingled freight for different areas. Tr. 177-179, 858-59, 863-64. At Logan Airport, Local 25 members sort the comingled freight, pull the containerized freight, and load all freight onto vehicles. Tr. 180-82, 228. Local 25 BOS members drive separate DHL Express vehicles from Logan to the Boston and Westborough Stations. Tr. 178-79, 229, 269.

No NEF work, vehicle, or employee would ever be present at either BOS or MXG during morning operations. Rather, NEF employees drive NEF vehicles from Logan Airport to the Manchester and Providence Stations. Tr. 178-79, 358, 858, 864, 926, 1119, 1194-95. NEF drivers are rarely if ever at BOS later in the day. NEF employees do drive tractor trailers from Providence Station to the Westborough Station with outbound freight. Tr. 918. The trucks are scheduled to

arrive at MXG at 6:45 p.m. and 7:30 p.m. Tr. 557-58. If running late, a DHLNH driver might drive straight to MXG (as opposed to first bringing outbound freight to PVD). Tr. 558, 563, 556.

II. The Primary Labor Dispute

On May 8, 2017, Local 251 filed a petition to represent "all full time and regular part-time driver/couriers" at the address of PVD, listing the "Employer" as "DHL Express USA Inc. / dba Northeast Freightways Inc. (Joint Employer)." Tr. 576, 921, 943, 987-88; GC-31. The petition named "Glenn Marzelli" as the "Employer Representative." GC-31. Local 251 withdrew the original petition and, on May 12, 2017, filed a new petition to represent the same employees. Tr. 576-77; GC-32; GC-33. The new petition identified "DHL-NH LLC/Northeast Freightways Inc." as the employer but also had handwritten "DHL Express" above. Local 251 identified both Santiago as the "Manager" and Marzelli as the "District Manager." Tr. 577; GC-33. Both petitions were signed by Michael Simone ("Simone"), Local 251's organizer. GC-31; GC-33. Simone was a very experienced organizer and part of his job was "to find out information about the employment relationship." Tr. 987-88. At the time of the filing of the petitions, he had been meeting with DHLNH drivers for months, including Joe Lee, an individual who had been employed in the position held by Santiago from April 2013 to August 2014. Tr. 815-16, 921.

Local 251 abandoned any claim that DHL Express was an employer of the drivers. On May 19, 2017, Local 251 entered into a Stipulated Election Agreement with DHLNH alone, agreeing that "The Employer" was DHLNH alone, and that the bargaining unit of DHLNH drivers was appropriate for the purposes of collective bargaining.[8] Tr. 577, 944; GC-34.

---

[8] Local 251 has given shifting and inconsistent explanations for its decision. At the outset of the hearing, Local 251 Principal Officer Matthew Taibi ("Taibi") supplied an affidavit in which he asserted under oath that Local 251 dropped a claim of joint employment against DHL Express because it would not stipulate to an election. L251-83 ¶ 2. A few weeks later when he testified in person, Taibi gave a different reason, claiming that the Union did not have "enough information"

During the election period, Local 251 filed several unfair labor practice charges against DHLNH relating to its election conduct. GC-42. The election was held, and on June 15, 2017, Local 251 was certified as the "collective-bargaining representative" of all "full-time and regular part-time drivers/couriers employed by [DHLNH, LLC]" at the address of the Providence Station. Tr. 577, 945; GC-35. At some point in bargaining, Local 251 and DHLNH agreed that "dock workers" employed by DHLNH also should be included in the unit. Tr. 991-92.

The same day that the certification was issued, Local 251 sent a letter to Fred Grubb ("Grubb"), counsel for DHLNH, requesting to bargain on all mandatory subjects. Tr. 993; CP-9. It also requested information regarding the employees, including wages, benefits, work rules and disciplinary actions. *Id.* In addition, Local 251 asked Murphy of Local 25 if he or the Express Division could assist the local with bargaining a first contract. CP-5. Local 251 was aware that within the Express Division there were "a handful of other collective bargaining agreements with what are called ICs" or independent contractors. Tr. 947-48.

Prior to the beginning of formal bargaining, DHLNH and Local 251 had informal discussions regarding discipline. Typically, Canaan or Grubb would contact the union regarding potential disciplinary issues. Tr. 992. For example, Grubb contacted Taibi regarding the suspension of a driver. CX-8; Tr. 993. DHLNH fired several drivers during the summer of 2017 and suspended another. Tr. 996. Local 251 filed unfair labor practice charges against DHLNH in connection with these disciplines and did not believe that DHLNH was satisfying its bargaining obligations in this regard. Tr. 994, 1130; GC-42. In all, Local 251 filed over 28 unfair labor practice charges against DHLNH, and Business Agent Matt Maini ("Maini") testified that the

---

"to pursue joint employment." Tr. 944, 983-84, 988. Taibi made no effort to reconcile his hearing testimony with the substance of his affidavit. Indeed, he did not recall the affidavit. Local 251 declined to call Simone to testify.

charges combined with the threat of Section 10(j) injunctive relief caused DHLNH to bargain seriously about discipline. Tr. 1130.

In August 2017, attorney Frank Davis ("Davis") of Ogletree Deakins replaced Grubb as counsel for DHLNH. Tr. 992, 1001; CP-11. Formal bargaining began on September 1. Tr. 992. Initially, DHLNH was represented by Davis and Canaan at the table. Tr. 1003. Local 251 was represented by Taibi, Maini, driver Joe Lee and driver Sarong Rath. Tr. 1003. During that first meeting, Local 251 presented a complete first contract proposal, and DHLNH presented a counterproposal "as to some noneconomic language issues." Tr. 946, 1003-04, 1010; CP-12; CP-13.

Formal bargaining continued in October. Palker began to attend on behalf of DHLNH, as well as Davis and Canaan. Tr. 1010. On October 13, 2013, Local 251 and DHLNH entered into an interim agreement. CP-14. The interim agreement resolved an outstanding unfair labor practice charge relating to DHLNH's alleged failure to bargain over wage rates for new hires. *Id.* DHLNH agreed to increase wages for a group of employees and to pay them a lump sum as backpay. DHLNH also agreed that Maini would have the right to immediate access to PVD during working hours to "investigate working conditions" and inspect time cards and payroll records. *Id.* This enabled Maini to visit the facility every day, to observe the working conditions, and ask questions about operations at the facility.[9] Tr. 1139. Lastly, Local 251 agreed to a no-strike provision, which was subject to termination upon 96 hours' written notice, and agreed that "[a]ny strike needs 10 day notice from the union." CP-14. In addition to this interim agreement, Local 251 and

[9] Although Maini testified multiple times in this proceeding, he did not testify about any such visits or about his observations.

DHLNH reached agreement on some contract provisions and on premium pay for holidays. Tr. 1134, 1135-36.

DHLNH and Local 251 continued to engage in bargaining during the first week of November. Tr. 992, 1003, 1009, 1018; CP-19, p. 3. Bargaining focused on resolving issues related to disciplines DHLNH had issued, including those that had been the subject of unfair labor practices. As a result of bargaining, DHLNH and Local 251 entered into a settlement agreement to resolve certain unfair labor practices. GC-44. Among other topics, the settlement agreement addressed discipline for minor accidents, progressive discipline, and bidding procedure for routes. *Id.* DHLNH also agreed to individual settlement agreements with employees who had been disciplined. CP-15; CP-16; Tr. 1018-19. Later in November 2017, Santiago issued discipline to a driver, alleging that the employee had violated the "Tardiness" term of the NEF/Land Air Express handbook. Tr. 997; CP-10.

DHLNH and Local 251 continued bargaining in January, February, March, and April of 2018. Tr. 1030, 1032; CP-19, p. 3. Local 251 took the first step towards a strike on February 25, 2018 by holding a strike vote among the DHLNH employees. Tr. 1031; CP-19, p. 2. Two days later, Local 251 emailed a "SBA1" — which is a Teamsters form that must be sent to the head of both the applicable Joint Council and Trade Division — to O'Brien and Hamilton regarding the possibility of a strike. Tr. 953-54; L251-57; CP-19. The form identified DHLNH, LLC as the Employer and the location as the address for PVD. CP-19. By April 23, 2018, DHLNH and Local 251 had reached tentative agreement on many topics, including grievance and arbitration; discipline; seniority and bidding; management rights; non-discrimination; equipment, safety, driving and testing; vacation; and leaves of absence. *See* Tr. 1031; CP-17; L251-67. There were

still "some language issues," but Local 251 and DHLNH were bargaining productively over them. Tr. 969, 1029-33; L251-67.

However, DHLNH and Local 251 remained apart on wages, pension and health care. Tr. 969, 1033. During bargaining, DHLNH insisted upon keeping its existing health plan, which Local 251 viewed as unaffordable. Tr. 1033-34. DHLNH also insisted on keeping its 401(k) plan. Tr. 1034. Local 251, in turn, insisted that DHLNH contribute to a Teamster pension fund and health fund. L251-67. Due to this impasse, Local 251 asked Hamilton for the Express Division's help on economics in early March. L251-57; L251-58; L251-59; L251-60; L251-61. Local 251 believed that if DHL Express "funded" the Cartage Agreement — meaning paid more money to DHLNH for its services — DHLNH would then agree to its economic proposals. Tr. 1006. However, Local 251 learned that DHLNH had an objection in principle to being in a union pension fund and a union health fund. Tr. 1034-35. DHLNH made its position clear immediately prior to the strike. *Id.* Local 251 became concerned that it would never reach agreement with DHLNH because of these objections and complained as much to Hamilton. Tr. 1035.

Local 251 thus decided to go on strike. On April 18, 2018, Davis sent an email to Taibi offering to do more with DHLNH's existing health plan, if the union dropped its demand for the Teamster health plan. L251-64. Davis also expressed a willingness to move on wages. *Id.* Taibi informed Hamilton that Local 251 and DHLNH were not "making any progress on key economic issues," and that Local 251 was "giving notice" to DHLNH to "end" the interim agreement and allow for a "potential strike action." L251-63. Four minutes later, Taibi emailed Davis that Local 251 was providing the required "96 hour notice on the interim agreement and 10 day notice of potential economic action." Tr. 963; L251-64. Taibi wrote that Local 251 "view[ed] healthcare and pension as key issues." Tr. 963; L251-64. On April 23, Taibi emailed Hamilton, O'Brien,

and Murphy that Local 251 would "likely be filing" a Teamster form to obtain strike benefits "by the end of the week and could take action early next week." Tr. 969, 1042; L251-66.

Local 251 commenced an economic strike against DHLNH at about 7:20 a.m. on April 30, 2018. Tr. 902. In a "Facebook live" video posted that day, Maini explained: "We're striking DHLNH which is an IC, independent contractor, for DHL. The issues here are pension, healthcare. Company doesn't want to give affordable healthcare and doesn't want to have [a] retirement plan for any of their workers." Tr. 1126; CP-21. Maini explained that the DHLNH health care plan had a high deductible, "which is unaffordable in our opinion." CP-21. In social media posts that day, Local 251 described the strike as against "a subcontractor for DHL Express" and that DHLNH was "a subsidiary of North East Freightways" with whom it had been bargaining "for a year." Tr. 574-75; GC-28; GC-29; GC-30.

The evidence is undisputed that up until the commencement of the strike, DHL Express had no role in the bargaining between Local 251 and DHLNH. Local 251 never asked DHL Express to participate in bargaining. Tr. 1006. Nor did Local 251 take the position at bargaining that the DHL National Master Agreement should be extended to the drivers of DHLNH, although it was familiar with the terms of that agreement. Tr. 946-47, 1005. Nor did DHLNH consult with DHL Express regarding bargaining. Rather, the first communication between DHLNH and DHL Express was on Wednesday, April 25, 2018. Palker called Evans and said that he thought that DHLNH and Local 251 had "reached an impasse" and a "walkout" may occur. Tr. 318, 346-47, 359. That was the first conversation that Evans had with anyone at DHLNH about the status of bargaining. Tr. 317. Similarly, Marzelli never spoke with anyone at NEF or DHLNH about the status of bargaining. Tr. 1239-40.

Nor was Local 251 on strike against DHL Express. By this point, Local 251 had its own bargaining relationship with DHL Express, as it has successfully organized the three clerical agents at PVD. Tr. 577; GC -36; GC-37; GC-38. However, the DHL Express clerical employees were never on strike. While one individual in that unit (Beth Stamp) did not work throughout the strike against DHLNH, she testified that she "honored the picket line" and was "not on strike." Tr. 1058, 1090. In fact, bargaining between Local 251 and DHL Express over the clericals began *after* the unlawful picketing in this case. DHL Express was represented at bargaining by attorney John Telford, Connolly, and Sidorski. Tr. 1007. Local 251 was represented by Murphy, Taibi and others at the bargaining table. Tr. 680, 1005-06. In connection with this bargaining, Local 251 took the position that the National Master Agreement should be extended to the clericals. Tr. 1008. And in fact by May 3, DHL Express and Local 251 had reached an agreement. Tr. 1008. Local 251 attempted to "talk" to DHL Express about Local 251 bargaining with DHLNH for the first time on May 3, 2018 (again after the picketing in this case and after the charge was filed), but DHL Express responded across the table that the parties were not there to talk about DHLNH. Tr. 1006-08.

III. The Picketing

A. Locals 251 And 25 Plan Picket Lines At BOS And MXG

About six hours into the strike against DHLNH — at 1:10 p.m. on April 30, 2018 — Taibi emailed officers of Teamsters Locals 25 and 671, including O'Brien and Murphy, that Local 251 was planning "on extending picket lines to DHL Express locations tomorrow" and asked for "location addresses and best times to arrive." Tr. 613, 681; GC-45. At the time, neither Local 25 nor Local 671 was engaged in a labor dispute with DHL Express. Tr. 688, 714.

In his email, Taibi claimed that DHL Express was acting as an ally by "providing management as couriers." GC-45. This statement was not true. While Bancroft, Sidorski and

Evans had arrived in Providence the night before to provide assistance to Marzelli and to address any issues at the facility, Tr. 349-50, 369, Taibi admitted that he did not see Bancroft, Marzelli, Sidorski, Evans, or any other DHL Express manager driving a van on April 30, 2018. Tr. 976-77, 984-86, 1035-36. Indeed, it is undisputed that Palker had replacement workers performing pickup and delivery work throughout the strike. Tr. 358, 1127-28, 1137.

For its part, Local 25 made no effort to ascertain whether or not Taibi's statement was true. Tr. 638, 640, 698. As Murphy explained at the hearing, his belief was that Local 251 could extend the picket line anywhere it wanted and saw no reason to investigate Taibi's claim of ally status. Tr. 642, 699. Thus, Local 25 jumped into action.

At 1:27 p.m., Local 25's Principal Officer Sean O'Brien emailed that Murphy "will be the point person for Local 25." Tr. 613, 626; GC-46. Also at 1:27 p.m., Murphy advised that, if the plan was "definite," he would "have Agents there," and that the "best time" was "8am" for BOS and "9am" for MXG. Tr. 614; GC-47. At 1:40 p.m., Taibi confirmed that the "extensions are definite," and that Maini would be "escorting" picketers to Boston, and Simone would be with the picketers in Westborough. Tr. 615; GC-49. At 2:00 p.m., O'Brien emailed a Local 25 organizer, Christopher Smolinsky ("Smolinsky"), copying Murphy, that, "Local 251 is extending Picket lines at both our locations. I will need you and Joe to be at the Westboro location… Murph will be point person for details." Tr. 425, 428-30; GC-27. "Joe" referred to Joe Foti ("Foti"), a Local 251 field representative. Tr. 430.

Later, Murphy spoke with "someone" about changing the times of the picket lines. They agreed to have picket lines in BOS "at 5 a.m. instead of 8," and Murphy told Smolinsky "in person" what time to go to Westborough (an hour earlier than originally planned). Tr. 629, 631, 635-56, 681-82. The times for the picket lines were chosen based on when Local 25-represented

DHL Express employees would be reporting to work. Tr. 681-82. Murphy initially suggested 8 am for BOS because that was when a majority of employees would arrive for work. *Id.* The time was changed to 5 am because some DHL Express employees arrived at that time. Tr. 682.

Local 25 did not know (or care) whether the extension of the picket lines to DHL Express facilities had been authorized by the Express Division. Tr. 684. In fact, in communications between Hamilton and DHL Express on April 30, Hamilton confirmed that as of 6:32 pm that day, "TDHLNNC has not at this time authorized any strike activity directed at DHL in locations covered by the Master Agreement." L25-4. Nor was Local 25 concerned about whether the picketing was primary or secondary. Murphy testified that "you do not cross picket lines" even if the picket lines are not "primary." Tr. 665-66.

Despite the attempts of both O'Brien and Taibi, the Unions were unable to extend the picket line to a third location in Hartford, Connecticut. At 1:40 p.m., Taibi explained that an individual had been assigned to go to Hartford if "times are confirmed." Tr. 615; GC-49. At 4:29 p.m., Taibi explained that "Hartford is not confirmed, so we cancelled and reallocated resources," and that "an early crew will go to South Boston, and another crew goes to Westborough." Tr. 616; GC-51. At 5:04 p.m., O'Brien responded, "We should shut down CT as well." Tr. 618; CP-3. Taibi replied at 5:12 p.m., that he hadn't "heard from CT." Tr. 618; CP-3. O'Brien answered at 5:21 p.m. He wrote, "[l]et's take them all down at once" and that he would "call" Dave Lucas, Local 671's Principal Officer.[10] Tr. 618, 681; CP-3. However, despite these apparent efforts by O'Brien, no picket line was established at the DHL Express facility in Hartford.

[10] Local 25 declined to have O'Brien testify.

B. The Picketing At BOS

The next day, May 1, Maini drove a van with four male DHLNH employees, including Sarong Rath ("Rath"), to the Boston Station, arriving around 4:30 a.m. Tr. 497, 506, 1107. Mani parked the van on the street in front of the parking lot at BOS. Tr. 505-06. Murphy arrived by separate vehicle at about the same time. Tr. 504, 634.

Wilfred Perry ("Perry"), who is the Boston Station's morning supervisor, arrived for work at 4:40 a.m. on May 1, 2018. Tr. 129. He observed Maini and the DHLNH employees in uniforms, as well as Murphy "standing with the picketers" and "wearing street clothes." Tr. 135-37, 190, 1107. The DHLNH drivers were wearing picket signs stating as follows: "ON STRIKE AGAINST DHLNH GOOD HEALTHCARE QUALITY RETIREMENT." Tr. 149-151, 302-304; GC-6; GC-7; GC-14; GC-15. There is no dispute that the DHLNH drivers engaged in picketing at BOS station that morning. GC-1(k). Between 5:30 a.m. and before 7:30 a.m., Perry observed individuals "picketing" — carrying picket signs and "circling like in a picket line" in front of an entrance — while Murphy stood about "six to ten feet" away. Tr. 149-51, 200.

After arriving, Perry called the BOS Station Manager (Anthony Baglio) and then the police. Tr. 137, 191. Around 5:00 a.m., Perry went back outside and asked Murphy, "What's going on?" Tr. 137-38, 207. Murphy responded that he was there "representing" or "in support of" "PVD drivers," and that he "was not going to allow the JFK truck to pull into [the] facility." Tr. 138, 207. Murphy testified that he saw the JFK truck arrive, Tr. 682, and never denied making the statement to Perry.

Several DHL Express employees were scheduled to report to work at the Boston Station at 5:00 a.m. Tr. 148. When they arrived, they did not report to work. *Id.* As they arrived, Murphy told them that Local 251 had extended a picket line and "that was all I needed to tell them." Tr. 702.

When the JFK truck arrived shortly after 5:00 a.m., the driver stopped the truck in order to back up onto one of the facility dock doors, but was approached by the picketers. Tr. 139, 195-96, 208. Local 251 members spoke to the Cargo Transport employee for a few minutes, while Murphy, Maini, and Local 25 members stood a few feet away. Tr. 139, 140-45,199; GC-4; GC-5. Perry took pictures of the incident, which depict the picketers, Maini, Murphy and Local 25-represented employees standing between the truck and the building. *Id.* In one picture taken by Perry, Murphy can be seen facing the driver of the truck, while a picketer spoke to the driver.[11] GC-7. The driver of the JFK truck appeared "angry." Tr. 216. When a police officer arrived around 5:15 a.m., Perry explained what was happening, the officer then spoke with the picketers, and the officer then "provided escort of the JFK truck onto" a station dock. Tr. 147, 166-168. The JFK truck pulled in at about 5:25 a.m. Tr. 147.

An additional nine DHL Express employees were scheduled to start at 6:30 a.m. Tr. 148. These employees arrived as scheduled, but none of them went inside the facility to work. Tr. 148.

Because the Local 25-represented employees were not reporting to work, at around 7:30 a.m., Perry decided that he and some managers would go to Logan Airport to perform the normal unloading and sorting work. Tr. 152, 181-183. At this time, no police officer was present. Tr. 202. When Perry attempted to exit the parking lot, he was "greeted by 20 to 30 DHL Express employees," meaning that they stood across the exit from the parking lot a few feet in front of his truck. Tr. 152-53, 218. Perry waited about 15 minutes for them to clear and when they didn't, he pulled the truck back into a parking spot. He went inside the facility, and recalled the police for assistance. Tr. 153, 204.

---

[11] When asked by counsel for Local 25 to explain the picture, Murphy could not explain what he was doing. Tr. 704.

Perry then tried to leave by vehicle through a different exit. Two DHLNH employees, one of whom was Rath, immediately moved in front of him to block his exit. Tr. 153-54, 204, 1108-09, 1110-11; GC-7. Rath admitted at the hearing that they were intentionally attempting to prevent Perry from leaving. Tr. 1108-11. When a police officer returned, Perry explained the situation, the police cleared a path that allowed him to exit, and Perry left — more than thirty minutes after his initial attempt. Tr. 154-55, 205, 1108.

After receiving reports regarding what was happening in Boston, Bancroft and Evans drove from their hotel in Providence to BOS. Tr. 320. They arrived shortly before 8:00 a.m., and Evans observed Maini and the four DHLNH drivers "in front of the access to the Boston parking." Tr. 321-23, 376-77. Maini confirmed that sometime between 8:00 and 8:30 a.m., he and the DHLNH drivers were "walking back and forth picketing the entranceway," while Murphy stood nearby. Tr. 362, 386, 506-07; GC-17. Evans stopped his car on the street, because "access to the parking lot was being blocked." Tr. 323, 365-67. Bancroft got out of the car and spoke with the police officers, the picketers continued blocking for a "couple minutes," and then the police officers "allowed" them to enter the parking lot. Tr. 323, 365-67.

After arriving and parking, Bancroft and Evans told Murphy that they wanted to speak with him and then went inside the facility. Tr. 323. After Bancroft finalized a letter to deliver to the DHL Express employees, Bancroft and Evans exited and handed Murphy a copy of the letter. Tr. 324-35; GC-13. In full, the letter stated:

> This morning, several of our employees decided to participate in an improper strike action against our company. Those employees, with the support of Local 25, claim that they are simply honoring a picket line established by Local 251 and in solidarity with that Local's members employed by a separate company that supports DHL Express operations in Providence. Those employee are mistaking, and their actions could cost them their jobs.
>
> This strike is a violation of the collective bargaining agreement between DHL Express and Teamsters Local 25. It does not matter whether the picket line at BOS

> was established by TDHLNNC, by Local 251, by Local 25, or by a group of our employees acting on their own. In all cases, the picket line is unlawful and in violation of our agreement.
>
> **ANY EMPLOYEE WHO CONTINUES TO STRIKE AND/OR HONOR AN UNLAWFUL PICKET LINE AT BOS OR MXG WILL FACE DISCIPLINE AS PERMITTED BY THE LABOR AGREEMENT. If you refuse to work for up to 24 hours from the beginning of the work stoppage, you will receive up to a 30-day suspension without recourse to the grievance process. If you continue to refuse to work beyond 24 hours, your employment may be terminated without recourse to the grievance process.**
>
> The strike started at 5:00 a.m. this morning. The clock is ticking. We hope you will not jeopardize your jobs over a labor dispute that doesn't impact you.

GC-13. After giving Murphy an opportunity to read the letter, Bancroft asked Murphy "why he was doing this." Tr. 325, 705. Murphy explained that O'Brien had "told him" to be at the Boston Station. Tr. 325. Bancroft said he was going to talk to the employees, and Murphy responded that "no one was going to cross the picket line." Tr. 325, 381.

Bancroft, Evans, and Murphy then walked across the street to where the DHL Express employees were standing. Tr. 326. Bancroft read the letter, while Evans handed out copies to DHL Express employees. Tr. 326-27. Murphy then spoke to the employees, saying "Local 25 respects picket lines" and that he was "asking people not to cross." Tr. 326-27. An employee asked, "Can they fire us?" and Murphy responded, "No, not if you stay out less than 24 hours." Tr. 326. The employee then replied, "I guess we're out here for 23 hours and 59 minutes." Tr. 326. At no point did Murphy — who was aware that Teamsters members can be fined for crossing a picket line — inform any of the employees that they would not be fined by the Teamsters if they crossed the picket line. Tr. 684. Nor did he encourage them to go to work. Tr. 683.

Maini began yelling at Bancroft, "you don't own the street bubba." Tr. 329; GC-11B. He then said, "We want health and welfare and pension that's when this will stop." Tr. 506-508; GC-11B. After Bancroft accused Maini of engaging in "illegal secondary picketing," Maini

replied as follows: "We want health and welfare we want pensions and deserve it now. You want this to stop? Then come back with the people who can make it happen, otherwise we're gonna be here every day." Tr. 506-508; GC-11B. Bancroft then spoke to the Local 25-represented DHL Express employees, "the doors are open. We're open for business when you're ready to come in." *Id.* Maini then yelled, "Nobody is coming in."

Local 251 posted about the picketing on Facebook. In one Facebook post during the picketing, Maini wrote: "In South Boston picketing shutting down DHL. Give DHLNH Quality health care and Pension for all." Tr. 302-04; GC-15. In another post, Maini posted a picture of Murphy standing with the picketers in front of the entrance to the parking lot. GC-15; Tr. 303-04. Maini wrote: "John Murphy standing strong and fighting for local 251 members at DHLNH. Thank you brother Murphy for all that you do when it comes to the fight you don't back down." GC-15. Local 251 posted the picture on its Facebook account. GC-16; Tr. 305.

After the picketing ended, Maini posted a video on Facebook of him speaking to Murphy, the DHLNH drivers and the Local 25-represented employees. Maini began by thanking everyone and then explaining the nature of the primary labor dispute with DHLNH:

> These guys want their health and welfare and pension options you know you these guys are in it. It's a wonderful benefit. [] We want 'em in the Teamster health and welfare. We want 'em in Teamster pension. We introduced 25 cents, 50, and a dollar over three years. They rejected that. They fundamentally told us that they could not accept being in a pension, that they would never associate their name to a Teamsters pension. So we made the decision that we were going to get a car and come up here and strike em and hit em where it hurts the most because DHL, well they are somewhat liable for this too, because they could step in and do the right thing and help fund the IC. Bring the ICs uh monetary level up to cover some of these benefits make it more appropriate, make it a living wage for all.

Tr. 306-07; GC-10B. Maini then thanked Murphy:

> So again, I want to thank Brother Murphy who is stellar. . . . I called him in the wee hours last night. He came out here at 4 o'clock in the morning and met me here from Providence.

GC-10B. Maini ended his speech as follows:

> Thank you and uh we are deeply indebted to you guys. You know how this works; we need to for one.... (unintelligible) we do for you... (unintelligible)... you honor ours, we honor yours always. We're going to take the picket line down. If there is any more action, Brother Murphy will inform you of that.

Tr. 306-07; GC-10B. Maini explained that he made the decision to "take the picket line down" after speaking with Taibi and Murphy, who testified that he had "telephone conversations [] regarding the pickets" earlier that morning with some unidentified person or persons. Tr. 512, 685. After the picket lines came down, Murphy told the DHL Express employees to return to work and then walked into the Boston Station with the DHL Express employees around 10:00 a.m.. Tr. 155, 341-42, 662.

C. The Picketing At MXG

While the picketing was occurring at BOS, a picket line was set up in Westborough. Smolinsky arrived at MXG at 8:00 a.m. as "planned." Tr. 430. He had never been to the Westborough Station before and he did not know any DHL Express employees there. Tr. 426. Indeed, Smolinsky claimed to not recall whether he had been given any instructions as to what he was supposed to be doing at the picket line. Tr. 495. When he arrived, he drove down the driveway and parked in front of the DHL Express facility. Tr. 431. He walked up to the top of the driveway and saw three individuals with picket signs and a man in street clothes — who Smolinsky did not recognize and assumed was from Rhode Island. Tr. 426, 430-33, 439, 443, 468, 479-80. The signs were the same as those worn in Boston. Tr. 480. There is no dispute that DHLNH drivers engaged in picketing at MXG that morning. GC-1(k).

At about 8:10 a.m., MXG morning supervisor Joel Fiutak ("Fiutak") observed multiple vehicles, including one with Rhode Island license plates, pull into the parking lot. Five individuals, including "some" "but not all" with picket signs and in "DHL uniforms," exited the vehicles and

began walking to the side of the building. Tr. 517-18, 550-51. At about 8:15 a.m., Fiutak went into the office of Station Manager Tom McArdle ("McArdle") and told him about the "visitors." Tr. 234-35, 517-18, 550-51.

Two DHL Express employees represented by Local 25 were working at the Westborough Station at that time — David Grasso ("Grasso") and Bert Yocum ("Yocom"). Grasso, a driver, had reported as scheduled at 7:00 a.m., while Yocum, a clerical employee, had reported as scheduled at 8:00 a.m.[12] Tr. 227-28, 238, 515-16.

By 8:30 a.m., Smolinsky walked down the side of the building. Tr. 439. He rang a doorbell to enter the warehouse, and a person wearing a DHL Express uniform (presumably Grasso) opened the door. Tr. 440-42, 480-2. Smolinsky introduced himself to the person and spoke to him. Tr. 440-41. McArdle had seen somebody — it had to be Smolinsky — walk towards the employee entrance to the warehouse. McArdle left his office and went into the warehouse. Tr. 234-35, 275. When he got there, Smolinsky was alone inside the warehouse. Tr. 234, 440-42. Smolinsky introduced himself and explained that he was there to set up a picket line.[13] Tr. 235, 290, 442. McArdle asked Smolinsky to leave, and Smolinsky left the building. Tr. 237, 442. Thereafter, McArdle realized that Grosso had left the building.[14] Tr. 240, 290-91.

---

[12] A third employee, John Kane, had been sent to Logan Airport at around 7:45 a.m., after McArdle learned that the BOS employees were not reporting to work. Normally, MXG containers would have been delivered from Logan by a BOS DHL Express employee. Tr. 229-34, 289, 372.

[13] At the hearing, the Judge initially struck McArdle's testimony as hearsay, Tr. 235, but later in the hearing, Smolinsky admitted that he spoke to a DHL Express manager and said something about setting up a picket line. Tr. 442. Thus, as Smolinsky is an agent of Local 25, McArdle's testimony regarding what Smolinsky said is not hearsay. *See* Rule 801 of the Federal Rules of Evidence.

[14] In July 2018, Murphy learned that Grasso had received a call from the Board and told Grasso that "he should call our attorney." Tr. 660-61. That attorney told the Board that Local 25 "instructed everybody that receives a phone call from the National Labor Relations Board to ignore it." GC-9B.

Also by 8:30 a.m., Yocum had left the building. Tr. 240, 290-91. Fiutak observed Yocum leave, and Yocum explained when leaving that he was "told by my union brothers that I have to leave the building." Tr. 520-22, 554.

Having discovered Smolinsky within the building, McArdle called the police when he returned to his office. Tr. 237, 278, 484. At this time, there was picketing in the area immediately outside the building, at a gate where trucks enter in and out of to make deliveries. Tr. 239, 533. Upon seeing a police car coming down the driveway, McArdle went out to speak with the officer and the building landlord. Tr. 238, 538-39. After speaking with the police, the picketers moved to the top of the driveway. Tr. 239, 279, 444-45; GC-8.

The picketing continued at the top of the driveway. Tr. 240. Eighteen DHL Express employees were scheduled to report at 9:00 a.m., but none of them pulled into the parking lot to report for work. Tr. 241-42, 523-24. At some point, a Local 25-represented employee drove by and asked Smolinsky for his contact information, and Smolinsky gave him his phone number. Tr. 477, 484. Smolinsky later received a text stating that the DHL Express employees who had not reported to work were "all at Target." Tr. 463-65. Sometime after that, another Local 25 member drove by and told Smolinsky that the employees were moving to an "abandoned warehouse." Tr. 472-73, 487.

Around 9:00 a.m. and as instructed by Evans, McArdle and Fiutak walked to the top of the driveway to read the same letter that Bancroft had read at BOS. Tr. 242-43, 294-96; GC-13. When they arrived at the top of the driveway, there were about five or six individuals "walking the picket line." Tr. 242-43, 253, 524. Although neither McArdle nor Fiutak recognized the individuals to be DHL Express employees, McArdle had been instructed to read the letter regardless of who was on the picket line. Tr. 252, 258, 296-97, 524. Before reading the letter, McArdle explained to the

picketers that the letter is "for our employees." GC-12B. Someone other than Smolinsky responded, "Then why are you reading to us?" Tr. 459-60; GC-12B. McArdle explained that he was doing what he was "asked to do," and a picketer responded, "There's no employees here." GC-12B. McArdle then read the statement in its entirety. Tr. 296-97. Fiutak recorded the reading of the letter with his iPhone until it ran out of memory. Tr. 525. In addition, Smolinsky recorded a video of these events, but the video was not produced in this proceeding. Tr. 260-61, 453, 529. While they were at the top of the driveway, Fiutak observed one DHL Express employee drive past the entrance. Tr. 254, 525, 541.

McArdle and Fiutak returned to the building after reading the letter, and they continued to observe that there were individuals "walking around" "across the entrance to the driveway." Tr. 254, 523. Around when the picket line at the Boston Station came down, Smolinsky drove to the abandoned warehouse where the DHL Express employees were massing and told them that "the line was down." Tr. 474, 489-90. Despite this obvious coordination between the picket lines at BOS and MXG, Smolinsky incredibly claimed that he had "no idea" that Murphy was in Boston, did not "recall who told us the start time," and had "no idea" "at what point" he learned "that the picket line in Boston was coming down." *Id.* Around 10:00 a.m., the DHL Express employees returned to the Westborough Station and began reporting to work. Tr. 255, 297.

The events of May 1 interfered with and delayed DHL Express's delivery operations out of the Boston and Westborough Stations. In the case of Westborough, the drivers did not leave to make deliveries until about 11:45 a.m. — two hours later than the normal schedule. Tr. 255-56. In the case of BOS, freight did not leave Logan Airport for the Boston Station until 10:30 a.m. — more than an hour after drivers are scheduled to leave for their normal deliveries. Tr. 155. Further, because it was a Tuesday, inbound Manchester freight on the JFK truck is usually

processed by Local 25-represented employees. Tr. 171-72. Because DHL Express had no one to drive the container to Logan Airport, the Manchester freight was held, and Manchester did not receive its containers from the JFK truck until the following day. Tr. 157-58, 175-76.

That afternoon, DHL Express filed charges of unfair labor practices against Local 25 and Local 251, which were amended on May 7, 2018. *See* GC-1.

IV. The Continuation Of The Strike At PVD And The Strike Settlement

Local 251 maintained a picket line at PVD for 24 hours a day, seven days a week for the entire nine weeks of the strike. Tr. 928, 1137. The picket line was the most populated during times that NEF vans were exiting and entering the facility. Tr. 928, 1138. Picketers took pictures and video of the of the vans as they entered and exited. Tr. 929.

During the strike, a key issue remained DHLNH's position on health insurance. Local 251 continued to believe that DHLNH's health plan was unaffordable, and DHLNH would not contribute to family coverage beyond what was paid for single coverage. Tr. 1136. Maini criticized that position in a number of posts on Facebook, characterizing Palker as being hypocritical. Tr. 1137.

At some point during the strike, Maini and some picketers drove to the town in New Hampshire where Palker lived. They picketed in front of his home and handed out flyers at his neighbors' houses and local stores. Tr. 1138. Local 251 sought to send the message to Palker's neighbors that Palker was a bad employer. *Id.* Local 251 believed that this tactic — going to Palker's house and leafleting in his community — was a game-changer in reaching a contract with DHLNH. Tr. 1139. Ultimately, DHLNH agreed to contribute an additional $100 per month for family coverage. Tr. 1137.

On June 28, 2018, Local 251 and DHLNH entered into a Strike Settlement Agreement in conjunction with entering into a first collective bargaining agreement. Tr. 578; GC-39 ¶5(a); GC-

40. Employees returned to work on July 2, 2018. The collective bargaining agreement between Local 251 and DHLNH contains all of the typical provisions of a first contract, including wage increases, medical and dental insurance, and a 401(k) plan. GC-40, Article 26, p. 21.

V. The Procedural History

The General Counsel issued a consolidated complaint in cases 01-CB-219768 and 01-CC-219536 on May 21, 2018, GC-1(i), and an order consolidating case 01-CC-219746 with those cases, amending the consolidated complaint and noticing a hearing for all three cases on June 26, 2018, GC-1(n). The amended consolidated complaint alleges that Respondents violated Sections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B) of the Act by establishing picket lines at the Boston and Westborough Stations and otherwise "appeal[ing] to individuals employed by DHL Express to engage in a work stoppage," with an object within the meaning of subparagraph (B) of Section 8(b)(4). GC-1(n) ¶¶ 13-16, 18. The amended consolidated complaint also alleges that Local 251 violated Section 8(b)(1)(A) of the Act when agents of both Respondents, including Murphy, "in the presence of employees, impeded entrance and exit from the BOS Station." *Id.*, 8, 17.

Local 251 and Local 25 answered the allegations of the amended consolidated complaint on July 5, 2018. GC-1(q);GC-1(r). Although denying that the picket lines targeted "DHL Express," Local 251 admitted that it had engaged in picketing at the addresses of both BOS and MXG. *See* GC-1(n) and GC-1(r). As separate affirmative defenses, Local 251 pled that picketing was directed at primary activity because "DHL Express is a joint employer with DHLNH;" "DHL Express is a franchisor to DHLNH as franchisee;" and "DHL Express is an ally." *Id.* In addition, Local 251 asserted as an affirmative defense that "any unlawful picketing was de minimis." *Id.*

On July 19, 2018, the General Counsel noticed an intent to amend the amended Complaint by adding an allegation that Local 25 violated Section 8(b)(1)(A) of the Act by telling employees

not to cooperate with and to ignore Board agents. Tr. 39. During the first hearing day, the Judge allowed that amendment. Tr. 59.

Local 25 filed an amended answer on August 8, 2018 to add deferral as an affirmative defense. The General Counsel moved to strike those defenses, and the Judge granted the motion, explaining that the allegations of the complaint were not appropriate for deferral. Tr. 420.

Local 251 issued a subpoena *duces tecum* to DHL Express. On July 18, 2018, DHL Express timely filed a petition to revoke portions of the subpoena (specifically categories 7 through 24), which relate to Local 251's "joint employer," "franchisor," and "ally" theories. *See* CP-1. On July 31, 2018, the Judge denied the petition to revoke the subpoena, except as to categories 15 and 21, which were withdrawn by Local 251, and categories 18 and 19 to the extent that they sought drafts. Tr. 8-33. As ordered by the Judge on the second hearing day, DHL Express complied with the outstanding subpoena requests on or before August 28, 2018. Tr. 394-96. Although the Judge ordered the parties to alert her to any discovery issues within one week thereafter, Local 251 raised no issue with DHL Express's production.

ARGUMENT

I. Respondents Violated Section 8(b)(1)(A) Of The Act

There can be no serious question that Local 251 violated Section 8(b)(1)(A) by blocking vehicles from entering and exiting BOS on May 1, 2018 in the presence of employees. The Board has long held that "blocking of vehicles, even for a short period of time and [] until broken up by police to allow entrance or exit, is [] coercive and violative of Section 8(b)(1)(A)." *Int'l Union of Operating Engineers, Local Union No. 17*, 335 NLRB 578, 584 (2001); *see also Unite Here! Local 5*, 365 NLRB No. 169, slip op. p. 1 n.2 (2017) (Section 8(b)(1)(A) violation where drivers were "peacefully" blocked for less than five minutes); *Int'l Bhd. of Elec. Workers, Local 98*, 350 NLRB 1104, 1107 (2007) (same where picketers blocked backhoe for "5 to 10 minutes"); *Plumbers, Local*

195, 233 NLRB 1087, 1093 (1977) (same where trucks were only detained momentarily but "[t]he appearance of the police . . . was the only method by which these employees and supervisors were permitted to enter the plant").

The undisputed facts establish three incidents of blocking during the picketing at BOS. First, Respondents prevented the JFK truck from pulling up to the facility for about 25 minutes until police arrived. While Local 251 suggested there is no evidence as to why the JFK truck stopped in front of the building, this was no "whodunit." It is undisputed that Murphy told Perry that Respondents were not going to let the truck enter, and the picketers made good on that statement. When the truck arrived and sought to back up to the facility, the picketers went up to the driver and began speaking to him. Tr. 139. Further, as Perry's contemporaneous photographs show, picketers stood in the driver's side doorway of the truck, while other picketers, Local 25-represented employees, Murphy and Maini stood between the truck and the building. It is undisputed that the truck was unable to pull into the facility until the police arrived to provide an escort.

Second, Respondents prevented Perry from leaving the facility for a total of about 35 minutes until police returned. Local 25-represented employees blocked Perry from leaving the parking lot in his vehicle, and then when Perry tried to leave through another exit, two DHLNH drivers blocked him from leaving that exit. Based on its questioning of Perry and Rath, Local 251 apparently seeks to blame the victim, suggesting that Perry should have escalated the situation by honking his horn and moving his truck toward the individuals blocking his path. No case suggests that this is even an arguable defense, and for good reason, as it would encourage drivers who are blocked by picketers to escalate the situation and increase the possibility of injury or violence. *See, e.g.*, *Longshoremen & Warehousemen Local 6 (Sunset Line & Twine Co.)*, 79 NLRB 1487,

1506 (1948) (explaining that the "interposition of passive force" by "standing in the way" of vehicles violates Section 8(b)(1)(A) of the Act where "drivers were faced with the choice of running down the pickets, at the risk of inflicting serious injury, or driving away"); *Int'l Bhd. of Elec. Workers, Local Union No. 98 & Tri-M Grp., LLC*, 350 NLRB 1104, 1108 (2007) (same); *Metal Polishers, Buffers, Int'l Local 67*, 200 NLRB 335, 337 n.10 (1972) (same). Rather, the focus under Section 8(b)(1) is whether the Respondents' conduct "may reasonably tend to coerce or intimidate employees in their exercise of rights protected by the Act." *Local 542, Intern'l Union of Operating Engineers v. NLRB*, 328 F.2d 850 (3d Cir. 1964) (union's argument the blocking and other misconduct had no effect was immaterial to whether there is a violation of the Act). That standard was easily met here, regardless of whether Perry honked his horn or inched his truck towards the bodies of the picketers. *See Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB 814, 815 (2001) (reversing ALJ's finding of no violation because there was "no hint of violence").

Third, picketers blocked Evans and Bancroft from driving into the parking lot when they arrived at the facility. Even after Bancroft asked the police for assistance, the police allowed the picketers to continue the blocking for several minutes before letting Evans drive through. While Bancroft, Evan and Perry are supervisors, the blocking occurred in the presence of DHL Express employees with Section 7 rights. The Board has long held that "even if picketing does not block employees' ingress or egress, it is unlawful if it blocks other individuals' ingress or egress in the presence of employees." *Unite Here! Local 5*, 365 NLRB No. 169 (Dec. 16, 2017). For example, the Board found a violation where picketers impeded entrance or egress by a manager for "several minutes" and until police intervened, reasoning that employees presumably learned about the incident because it "occurred during normal business hours." *Shopmen's Local Union No. 455*,

243 NLRB 340, 346 (1979); *see also Local Joint Exec. Bd. of Las Vegas*, 323 NLRB 148, 159 (1997) (Section 8(b)(1)(A) covers conduct "directed toward nonemployees so long as the acts were committed in the presence of employees, whose Section 7 rights might be affected or as the acts were sure to become known to employees and employees would 'regard [them] as an indication of what may befall them if they fail to support the [picketing]'"); *Nat'l. Health & Human Serv. Employees Union*, 339 NLRB 1059, 1062 (2003) ("We conclude that employees of the Hospital could reasonably fear that they would be subjected to similar abusive behavior if they did not submit to the Union's wishes, and therefore we hold that Josephs's conduct violated Section 8(b)(1)(A).").

Although none of its affirmative defenses relates to the Section 8(b)(1)(A) violation, Local 251 nonetheless asks the Judge to disregard its misconduct by finding that the blocking was de minimis. As the Judge has noted in the context of the Section 8(b)(4)(B) allegation, this is not a real defense. Tr. 74-75. The Board has long recognized that "'blocking an entrance or an exit even for a short period of time constitutes restraint and coercion' within the meaning of Section 8(b)(1)(A) of the Act." *Sheet Metal Workers Intern't Assoc.*, 316 NLRB 426, 431 (1995) (quoting *Iron Workers Local 455*, 243 NLRB 340, 346 (1979)). Local 251's purported defense ignores the reality of the situation — that throughout the five hours of picketing at BOS, Respondents sought to "shut down" the facility and ensure that Local 25-represented DHL Express employees did not go to work. The three blocking incidents, combined with the picketing as a whole, establish that Local 251 sought to impede entrances and exits for the entire period that the picket lines were up. *Cf. Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1099 (1979) ("1 hour out of many months"); *Serv. Employees Int'l Union Local 50, AFL-CIO*, 198 NLRB 10, 12 (1972) ("haphazard efforts to block the driveways with two chairs on one occasion and misparked

cars on another"). And of course, the blocking had its desired effect, as Local 25-represented employees engaged in a work stoppage.

Lastly, the Judge should conclude that Local 25 also violated Section 8(b)(1)(A). Although not separately alleged, the Amended Complaint alleges sufficient facts to find a violation. The Amended Complaint specifically alleges that Murphy is an agent of Local 25 and that Murphy, in conjunction with Maini and other individuals aligned with Local 251, impeded entrances and exits. GC-1(n) ¶¶ 6, 8. These factual allegations are sufficient to support the finding of a violation. Regardless, the violation is closely connected to what is alleged in the Amended Complaint and was fully litigated. *See, e.g., Pergament United Sales*, 296 NLRB 333, 334 (1989).

The evidence supports the conclusion that Local 25 violated Section 8(b)(1)(A). There can be no question that as a Business Agent of Local 25, Murphy is an agent of Local 25. Indeed, Local 25's principal officer, Sean O'Brien, designated him as Local 25's point person in connection with the establishment of picket lines at BOS. Nor is there any dispute that in response to Perry's question to him about what was going on, Murphy responded that "**he** was not going to allow the JFK truck to pull into our facility." Tr. 137-38 (emphasis added). Given this statement and the actual blocking of the JFK truck, the Judge should conclude that Local 25 also violated the Act. *See Metropolitan District Council of Philadelphia and Vicinity, United Brotherhood of Carpenters*, 281 NLRB 493, 497 (1986) (where union business agents were present at picket line but took no steps to divorce themselves from illegal blocking, the union could be held responsible for unlawful acts of coercion and restraint).

II. Respondents Violated Section 8(b)(4)(B) Of The Act

A. Counsel For The General Counsel Proved Her Case

The Board has long held that there are two elements necessary to establish a violation of Section 8(b)(4)(i) and (ii)(B) of the Act: (1) a labor organization engages in conduct which induces

or encourages individuals to engage in a strike or refusal to perform services or which threatens, coerces or restrains any person; and (2) an object of the conduct is to force or require any person to cease doing business with any other person. *See United Food & Commercial Workers Union*, 334 NLRB 507, 507 (2001). Here, the evidence demonstrates that both elements have been met.

As to the first element, picketing alone satisfies both the "induce or encourage" conduct standard of 8(b)(4)(i) and the "threaten, restrain, or coerce" conduct standard of 8(b)(4)(ii). *Teamsters Local 122*, 334 NLRB 1190, 1191 & n.8 (1991); *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB 797, 802 (2010). This is because picketing — "the combination of the carrying signs and persistent patrolling" — "creat[es] a physical or, at least symbolic confrontation between the picketers and those entering the worksite." *United Brotherhood of Carpenters*, Local 1506, 355 NLRB 797, 802 (2010). For example, in *Local 272, Intern't Assoc. of Bridge, Structural, and Ornamental Iron Workers*, 195 NLRB 1063 (1972), the union, which represented employees of a subcontractor, picketed the general contractor on a construction project over delinquent benefit contributions, causing employees of the general contractor to cease work. In reversing the judge, the Board concluded that this conduct satisfied the requirements of both Section 8(b)(4)(i) and (ii)(B). *Id.* at 1064. Here, there is no question that Local 251 set up picket lines at BOS and MXG to induce Local 25-represented DHL Express employees to engage in a work stoppage. Indeed, Respondents set the times of the picket lines to ensure that they were up before nearly all employees arrived at work.

Beyond the picketing itself, the evidence demonstrates that Respondents engaged in other conduct which satisfies the "induce or encourage" standard. At the outset of the picketing, Murphy told DHL Express employees at BOS that there was a picket line as a signal to them that they should not cross. As Murphy admitted at the hearing, that was all he needed to do to ensure they

did not go to work. Indeed, Murphy emphasized at trial that the DHL Express employees understood that the establishment of a picket line meant that they should withhold their services — "I didn't have to tell them." Tr. 700-01. Murphy's testimony concedes what the Board has long understood — that "picketing is a 'signal' to the initiated" that employees should not cross. *General Teamsters Local No. 126*, 200 NLRB 253, 255 n.8 (1972).

Smolinsky did the exact same thing at MXG when he went into the warehouse and spoke to a DHL Express employee (presumably Grasso), causing Grasso and then Yoakum to leave.[15] The Local 25-represented employees at MXG massed at a nearby Target and then a warehouse until Smolinsky told them they could go to work. Thus, not only did Respondents set up picket lines at BOS and MXG, Local 25 ensured that DHL Express's employees got the message that the picket lines meant they should not cross or work behind them. *See, e.g., Los Angeles Building & Construction Trades Council*, 215 NLRB 288, 290 (1974) (statement that picket line was authorized was sufficient to constitute inducement and encouragement). Respondents then went further. When DHL Express sought to encourage its employees to go to work, Murphy told Bancroft and Evans that nobody was going to cross and then told the employees that Local 25 honors picket lines and asked them not to cross. Similarly, Maini yelled in the presence of the DHL Express employees, "nobody's coming in." Thus, there can be no serious question that the "induce or encourage" prong of the first element has been satisfied.

Similarly, the Board has repeatedly held that a union engages in conduct satisfying the "threaten, restrain, or coerce" standard if the picketing is successful in inducing secondary

---

[15] Any other conclusion would be incredible. Smolinsky offered no explanation as to why he went into the warehouse, yet Grasso and Yoakum left within minutes of him showing up. More generally, Smolinsky's claimed inability to remember how he knew when to go to MXG, what instructions he was given for when he got there, and how he knew to tell the MXG employees that the line was coming down, calls into question the veracity of his testimony as a whole.

employees to withhold their services. *See Los Angeles Building & Construction Trades Council*, 215 NLRB at 290 (finding violation of Section 8(b)(4)(ii) where the inducement of employees was successful and resulted in work stoppages against a neutral employer); *see also United Food & Commercial Workers Union*, 334 NLRB at 508. Here, it is undisputed that DHL Express employees at both BOS and MXG engaged in a work stoppage in response to the picketing.

As to the second element, the undisputed evidence establishes that Respondents had an unlawful "cease doing business" objective. The Board has held that a "cease doing business" object is "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."[16] *United Food & Commercial Workers, Local No. 1996*, 336 NLRB 421, 426 (2001). In its unsuccessful motion to dismiss, Local 251 argued that there is no evidence that it "wanted DHL Express to cease doing business with DHLNH" going so far as to claim that this was "boilerplate language from somebody else's complaint." Tr. 750. However, as the Judge correctly recognized, the word "cease" does not require proof that Respondents literally sought a complete cessation of business. *See NLRB v. Local 825 Operating Engineers (Burns and Roe),* 400 U.S. 297, 304 (1971) (rejecting a reading of "cease doing business" as "requiring that the union demand nothing short of a complete termination of the business relationship"). *Id.* at 304. Rather, the "cease doing business" standard is satisfied whenever **an** objective of the union is "interference with business, consistent with enmeshing neutrals in a dispute not their own." *Rd. Sprinkler Fitters Local Union 669*, 365 NLRB No. 83 (2017).[17]

---

[16] The Board uses the phrase "cease doing business" generally to cover all proscribed objectives other than proscribed recognitional objectives. *Id.*

[17] *See also Int'l Longshore & Warehouse Union, AFL-CIO,* 363 NLRB No. 12 (2015) ("it need only to be shown that the union's secondary activities sought to alter the way in which the primary employer traditionally operates"); *Serv. Employees Int'l Union Local 525,* 329 NLRB 638, 675

Here, the evidence is overwhelming that Respondents sought to disrupt DHL Express's operations in order to enmesh it in the labor dispute between Local 251 and DHLNH. In planning the picketing at DHL Express locations, the Respondents made clear that their objective was to cause a work stoppage and to shut down its operations. The timing of the picket lines was intended to occur when most employees would arrive to work, and in their email communications, Respondents sought to "shut down" the DHL Express locations.

Not only did Respondents seek to disrupt DHL Express's operation, they did so in order to push DHL Express to pressure DHLNH to accept Local 251's demands for Teamster benefits. During the picketing, the picketers wore signs about Local 251's labor dispute with DHLNH -- that they were on strike against DHLNH for "Good Healthcare [and] Quality Retirement." Local 251's description of the picketing in social media posts left little doubt regarding Respondents' unlawful secondary objective. In one post, Local 251 connected up its picketing with the goal of pulling DHL Express into the labor dispute: "In South Boston picketing shutting down DHL. Give DHLNH Quality healthcare and Pension for all." GC-14. Maini made the same connection in a Facebook live video, but even starker. After explaining that the DHLNH drivers sought Teamster health and pension but DHLNH rejected those proposals, Maini explained:

> So we made the decision that we were going to get a car and come up here and strike em and hit em where is hurts the most because DHL, well they are somewhat liable for this too, **because they could step in** and do the right thing and help fund the IC.

(1999) ("The phrase, 'cease doing business' [] includes conduct which is intended or likely to disrupt or alter the business dealings between the two"); *Gen. Longshore Workers, ILA,* 235 NLRB 161, 168 (1978) ("the 'cease doing business' requirement [is] satisfied if the conduct [] has the purpose or effect of interfering with normal business relationships"); *Newspaper Guild, Los Angeles, Local 69 (Hearst Corp., San Francisco & Los Angeles Herald-Exam'r Divs.)*, 185 NLRB 303, 322 (1970) ("It is enough that disruption of its business with others was an object of the picketing").

GC-10B (emphasis added). Indeed, Maini threatened Bancroft in front of the Local 25-represented employees that the picketing would only stop when the DHLNH workers received Teamster benefits. These undisputed statements establish an unlawful secondary object.[18] *See Local 560, Int'l Bhd. of Teamsters*, 360 NLRB 1067, 1068 (2014) (threat to begin "putting a picket line against [neutral]" was direct evidence sufficient to establish secondary objective).

Local 251 attempted to characterize the evidence as reflecting merely "an attempt to fulfill the collective bargaining terms regarding [Teamster] health plan and [Teamster] pension plan." Tr. 184. However, that is an unlawful object under well-established Board law. In *Local 272, Intern't Assoc. of Bridge, Structural, and Ornamental Iron Workers*, the Board found a secondary object where the union picketed a secondary employer, a general contractor on a construction project, over the subcontractor's failure to make benefit contributions. *See* 195 NLRB at 1063. The Board explained that the union sought to "caus[e] a business disruption between [the general contractor] and the subcontractors on the project." *Id.*

More recently, the Board found picketing to have a secondary object on facts very similar to those presented here. In *Preferred Bldg. Servs., Inc.*, 366 NLRB No. 159 (2018), the union represented employees of Preferred, a janitorial service provider. The union picketed Harvest, a building management company, regarding the wages paid by Preferred, and like Maini here, threatened to keep showing up until employees' wages were increased. On these facts, the Board concluded that the judge erred in failing to find the picketing unlawful, because "an object of the

[18] During the hearing, Respondents suggested that they might have had other objectives on May 1. While there is no evidence that this is true, it does not matter. In *Retail Clerks Union, Local 770*, 145 NLRB 307, 308-09 (1963), the Board explained that strikes might have a number of objects but if *an* object is to cause a cessation of business, then the objective is unlawful.

picketers was to pressure Harvest, a neutral employer, to cease doing business with Preferred unless it increased wages." *Id.*, slip op. p. 6.

Lastly, the second element requires that there be a person neutral to the primary labor dispute. Contrary to what the Respondents suggested at the hearing, counsel for General Counsel was not obligated to prove the negative — that DHL Express was not a joint employer, not an ally and not franchisor. The Board has made clear that the General Counsel's burden is to establish that DHL Express was "ostensibly" a neutral to the labor dispute between Local 251 and DHLNH. *See SEIU Local 525*, 329 NLRB 638, 639 n.15 (1999). The Board's use of the word "ostensibly" emphasizes that counsel for the General Counsel's burden is to show that DHL Express is neutral from "outward appearance," not to disprove Local 251's affirmative defenses. *See* Merriam-Webster's Dictionary (11 ed.). Indeed, as discussed below, the Board has made clear that Respondents "bear[] the heavy burden of demonstrating loss" of neutrality status. *See SEIU Local 525*, 329 NLRB at 639.

Here, the evidence is undisputed that DHL Express is a separate "person" from either NEF or DHLNH. DHLNH and NEF are based in New Hampshire, and are owned by Palker. In contrast, DHL has its US headquarters in Florida and its worldwide headquarters in Germany. Palker and Canaan manage and control the operations of NEF and DHLNH and the entities' labor relations. DHL Express has its own separate management and its own labor relations staff. Thus, DHL Express is a separate person from NEF and DHLNH. *See id.* at 640 n.20 (absent proof by the union of loss of neutral status, two entities that contract with each other, such as a building and janitorial contractor, are separate persons). While DHL Express and NEF have a business relationship and DHL Express was concerned about a disruption in that business relationship due a strike, those facts do not alter DHL Express's status as a neutral. *Id.* at 640-41.

B. Local 25 Is Liable For The Violation Of Section 8(b)(4)(B)

Local 25 engages in pure fantasy in claiming that it did nothing to violate Section 8(b)(4)(i) or (ii)(B). The facts establish two independent grounds for liability — as a joint venturer with Local 251 or by the conduct of Local 25's agents, Murphy and Smolinsky. First, a joint venture exists whenever "the venturers participated in a planned course of action, jointly conceived, coordinated and adopted to attain a mutually agreed upon object." *General Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 253, 272 (1972). Where established, "each [joint venturer] is responsible for the conduct of other members of the joint venture and of agents of each other in pursuit of the common aim." *Elec. Workers, IBEW*, 150 NLRB 363, 373 (1964).

Based on their arguments on the motion to dismiss, Respondents apparently contend that absent here was any "joint planning" to set up a picket line, because the Unions did not physically meet in advance.[19] Tr. 778-79. Respondents' suggestion that something can only be "planned" via an in-person meeting would require the Judge to ignore modern methods of communication and specifically their email communications on April 30. Those communications establish that the Unions planned the picketing together. Local 25 told Local 251 where to set up the picket lines, advised regarding the best times to go, and chose the "best times" in order to maximize the disruption to DHL Express's operations. As Murphy admitted at the hearing, the original times were chosen because they were when a majority of DHL Express employees would show up for work. He then admitted that the times were moved up earlier because some employees arrived to work earlier than the original start time. Tr. 681-82. Local 25 also assigned a "point person" — Murphy — and ensured that Local 25 had agents on the ground at both BOS and MXG.

---

[19] Local 251 also noted that the picket signs did not refer to both Unions. The existence of a joint venture does not depend on the language of the picket signs

While Local 25 has tried to claim that those agents were there to ensure that Local 25-represented DHL Express employees knew their rights, the emails from Local 25's principal officer, Sean O'Brien, to Taibi make clear that Local 25 was "all-in" on shutting down DHL Express. When Taibi told O'Brien that he was cancelling a picket line in Hartford, O'Brien disagreed, writing "***[w]e*** should shut down CT as well." GC-52 (emphasis added). A few minutes later, in response to Taibi suggesting again that there would be no picket line at Hartford, O'Brien wrote, "***[l]et's take them all down at once***" meaning BOS, MXG and Hartford, and then offered to call the principal officer of Local 671. CP-3 (emphasis added). O'Brien's use of the words "we" and "let's" — the contraction of "let us" — establishes that Local 25 participated in a joint course of action between the Unions. *See Constr., Shipyard & Gen. Laborers, Local 1207 (Alfred S. Austin Constr. Co.)*, 141 NLRB 283, 286 (1963) ("timing and sequence of events" established liability as a joint venturer); *Retail Fruit & Vegetable Clerks' Union Local 1017*, 116 NLRB 856, fn. 14 (1956) (joint venture in violation of Section 8(b)(4) where an agent of the union not involved in the primary dispute "maintained surveillance of the picket line," "actually walked in the line, although only for a few minutes," and "in conversation with members of his Local indicated approval of the picket).

But beyond the email communications, Murphy and Smolinsky, as agents of Local 25, engaged in conduct that establishes a violation of the Act. Under Section 8(b)(4)(i), unlawful conduct includes anything that "would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer." *Teamsters Local 122*, 334 NLRB 1190, 1191 & n.8 (1991). Murphy and Smolinsky were there to ensure that Local 25-represented DHL Express employees engaged in a work stoppage. As described *supra* page 40, they sought to make sure that DHL Express employees understood that because there was a picket

line, they should not go to work or, if already working, not work behind the picket line. That was why they were there, and precisely why Local 251 thanked Murphy at the end of the picketing in BOS for "standing strong and fighting for Local 251 members." GC-15. Thus, by virtue of the conduct of Murphy and Smolinsky, Local 25 should be found to have violated Section 8(b)(4)(i) and (ii)(B). *See Int'l Bhd. of Elec. Workers, Local 98*, 327 NLRB 593 (1999) (presence of a union agent was 8(b)(4)(i) conduct); *Los Angeles Bldg. & Constr. Trades Council*, 215 NLRB 288, 289 (1974) (statement that picket was authorized and sanctioned constituted 8(b)(4)(i) conduct); *see also Iron Workers Pac. NW. Council (Hoffman Const.),* 292 NLRB 562, 585 (1989).

C. Neither Respondent Can Claim A Good Faith Mistake

Nor can either Respondent claim that the picketing was a good faith mistake. This case was not ambulatory picketing gone wrong. Local 251 has not claimed nor can it claim that it mistakenly believed that DHLNH was present at either BOS or MXG on the morning of May 1. The undisputed evidence is that DHLNH is rarely, if ever, at BOS and only at MXG in the evening.

Nor can Local 25 claim that it was misled by Taibi's false claim that DHL Express managers had been acting as couriers on April 30. The evidence makes clear that Local 25 was indifferent to the purported ally claim and made no effort to ascertain whether it was true or not. As Murphy explained at the hearing, his view was that "Local 251 can extend the picket line anywhere they want . . I want them to extend it." Tr. 642. Accordingly, he did nothing to investigate Taibi's claim, explaining "I don't know why I would." Tr. 698-99. Although Murphy could have contacted management at BOS or labor relations (Yates or Connelly) to learn the truth, he admittedly did nothing. And while Local 25 repeatedly asserted at the hearing that all that Murphy did was to ensure that employees understood their rights under Article 8 of the National Master Agreement, Article 8 turns on whether or not a strike is authorized or not, and Murphy admittedly had no idea whether it had been authorized or not. Tr. 683-84. In fact, Hamilton's

email to Yates the evening before confirmed that an extension of the strike beyond PVD had not been authorized.

All of these facts establish that Local 25 cannot rely on a claim of ignorance to escape liability, because it made no attempt to cure its ignorance. In *Laundry & Dry Cleaning Union, Local 259*, 164 NLRB 426 (1967), the Board found no violation of the Act where the union made an "inquiry" to an employer as to whether it had been performing struck work, but that inquiry went unheeded. *Id.* at 427. In that case, the Board reasoned that there was no "showing or suggestion that the Respondent knew, or could have determined through exercise of ordinary diligence" whether the target had lost its neutral status. *Id.* But the circumstances of that case are a far cry from this one. Local 25 did nothing, let alone exercise ordinary diligence, to ascertain the truth. Rather, its blind adherence to what Taibi had asserted reflects that it was indifferent to knowing the truth. Its goal was to coordinate with Local 251 to extend the picket lines and to "shut down" DHL Express, regardless of whether doing so was lawful or not. Indeed, Local 25 did not deviate from the goal, even when Bancroft told Murphy that DHL Express viewed the picketing as illegal. In response, Murphy told the employees that Local 25 honors pickets lines and asked them not to cross. No Board decision suggests that such willful ignorance can serve as a defense. *See Shopman's Local Union No. 455*, 243 NLRB 340, 347 (1979) (rejecting defense based on claim of a "mistaken and sincere" that target was an ally, where the record did not support a conclusions that the target was ever an ally); *Linoleum Union, Local 1236*, 180 NLRB 241, 243 (1969) (mistaken belief that primary employer was present during the day was no defense to picketing during the daytime, where the union made "no effort" to determine whether the primary employer was present during the day).

III. Local 251's Affirmative Defenses Should Be Rejected

Counsel for the General Counsel has established that Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act. Local 251 has asserted three affirmative defenses, claiming that DHL Express was a primary because (1) it was a franchisor to DHLNH as franchisee; (2) that it acted as an ally; or (3) was a joint employer. In a fourth affirmative defense, Local 251 alleges that even if the picketing was unlawful, it was de minimis.

Local 251 bears the burden of proving each of its affirmative defenses. As the Board has explained, "[t]he union bears the burden of proof" of establishing that an ostensibly neutral employer is "an ally of the primary or otherwise enmeshed itself in the primary dispute." *SEIU, Local 525*, 329 NLRB at 639 n.15. Further, the Board has emphasized that Local 251's burden is a "heavy" one, because Congress sought to "shield neutrals from labor disputes that were not their own." *Id.* Each of Local 251's affirmative defenses fails on the law and the facts.

A. The Franchisor Defense Is Not A Real Defense

As the Judge recognized on the first day of hearing, Local 251's claim that DHL Express was a franchisor to DHLNH as franchisee is not a defense to a violation of Section 8(b)(4). Tr. 75-76. A franchise relationship typically is one where a manufacturer or supplier gives a retailer the right to use its products and name on terms and conditions mutually agreed upon. *See Black's Law Dictionary* (6th ed.) (defining franchise in the commercial context). But Board law is well established that the mere existence of such a relationship does not render one of the parties a primary to the other's labor disputes. In *Teamsters Local 456*, 273 NLRB 516 (1984), the Board held that a union violated Section 8(b)(4) when it threatened to picket retail ice cream stores operating under the Carvel name in connection with its primary labor dispute with Carvel Corporation. *Id.* at 519-20. In reaching that conclusion, the Board acknowledged that there was "integration of operations and economic interdependence" in that case and generally that "[s]uch

mutual interdependence, necessary for the economic survival of both parties, is characteristic of franchise operations." *Id.* However, the Board rejected the notion that those characteristics alone rendered a party to a franchisor-franchisee relationship a primary in a labor dispute involving the other. *Id.; see also Parklane Hoisery Co.*, 203 NLRB 597, 613 (1973) ("franchisees who purchase their stock in trade . . . from their franchisor's suppliers will not, merely by virtue of their commitments in that connection, be considered functionally integrated with their franchisor").

More generally, federal labor law protects close business relationships, regardless of the importance of the relationship to the primary employer. *See NLRB v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607 (1980) (Where a secondary derives almost all of its revenue from selling the product of a primary employer, the secondary is protected); *Newspaper & Mail Deliverers*, 271 NLRB 60, 68 (1984) (distributors are protected even where the product of the primary would be "useless unless distributed"); *Teamsters Local 557*, 338 NLRB 896 (2003) (where primary employer is providing services for the target of the secondary conduct, the entity that contracted for those services is protected). And the law protects those relationships regardless of whether the secondary is concerned about the outcome of the labor dispute. *See SEIU Local 525*, 329 NLRB at 640-41 n.19; *see also Canned Foods, Inc.*, 332 NLRB 1449, 1449-50 (2000) (grocery store's concern about union activity involving supplier did not cause store to lose neutral status).

As the hearing in this case progressed, Local 251 seemingly abandoned this affirmative defense. In its opening statement, Local 251 made no mention of its franchisor- franchisee defense. Tr. 813. Instead, Local 251 retreated to an argument that DHL Express is not neutral because without DHL Express, DHL Express does not exist. *Id.* The foregoing Board decisions make clear that whatever economic dependence DHLNH might have on its relationship with DHL Express is not relevant to whether DHL Express somehow lost its status as a neutral. A

Carvel ice cream store depends on Carvel for ice cream, trademarks and supplies, but that does not make it a primary to the other's labor disputes. *Teamsters Local 456*, 273 NLRB at 519-20. Regardless, Local 251's assertion that DHLNH's existence depends on DHL Express is contradicted by the evidence. The Cartage Agreement makes clear that the relationship was not exclusive, and, in fact, it is undisputed that Palker's entities had other customers.

Further, Local 251 now asserts that DHL Express "is the senior party in a vertically-integrated operation in a "common facility." Tr. 813. In making this argument, Local 251 seeks to pervert the single employer branch of the ally doctrine. As described below, DHL Express was not an ally to DHLNH under any theory. But in making this argument, Local 251 appears to acknowledge that its franchisor-franchisee fails as a stand-alone defense. It presented no evidence of a franchisor-franchisee relationship between DHL Express and DHLNH, because there is none. The relationship looks nothing like a franchise relationship. NEF provides a service in the PVD area, but the customers in that area remain those of DHL Express. Indeed, the Cartage Agreement expressly disavows the creation of a franchisor-franchisee relationship. The defense should be rejected, as the Judge recognized at the start of the hearing.

B. Local 251 Failed To Prove That DHL Express Was An Ally

Local 251's defense that DHL Express was an ally should also be rejected. The Board has recognized two branches to the doctrine – (1) the ostensible neutral is a "single employer" with the primary or (2) it performs the primary's "struck work." *See SEIU Local 525*, 329 NLRB at 639-40. As described below, Local 251 has not established ally status under either theory.

1. DHL Express And DHLNH Were Not A Single Employer

Local 251 cannot seriously claim that DHL Express and DHLNH were a single employer at the time of the picketing. Two or more "nominally separate business entities" constitute a single employer "where they comprise an integrated enterprise," as evidenced by "interrelation of

operations, common management, centralized control of labor relations and common ownership." *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965). The absence of common ownership, alone, forecloses any single-employer claim here. *See US Reinforcing, Inc.*, 350 NLRB 404, 405 (2007). While DHLNH, NEF, Land Air and PDS are all commonly owned by Palker and thus could be a single employer, the same cannot be true of DHLNH and DHL Express. Palker, based in New Hampshire, owns DHLNH, but DHL Express is owned by a corporation based in Germany. On this basis alone, any single employer claim must fail.

Even where common ownership is present, "it is not determinative in the absence of centralized control over labor relations." *Mercy Hosp. of Buffalo*, 336 NLRB 1282, 1284 (2001). "Common ownership by itself indicates only potential control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises actual or active control over the day-to-day operations or labor relations of the other." *Dow Chem. Co.*, 326 NLRB 288 (1998).

Local 251 does not and could not claim that DHL Express had centralized control over the labor relations of DHLNH. The Union sat at the bargaining table with Palker, Canaan, and their lawyer Frank Davis for nine months in advance of the strike and continued to bargain with them thereafter. They negotiated all of the typical terms of a first contract, discussed issues relating to disciplines and discharges, and resolved disputes between the Union and DHLNH. There is no evidence whatsoever that DHL Express played any role in this process. *See, e.g*, *IBEW Local 2208*, 285 NLRB 834, 836-39 (1987) (no ally relationship where parent did not control daily labor relations of subsidiary); *Los Angeles Newspaper Guild, Local 69*, 185 NLRB 303, 304 (1970) (no ally relationship where parent had only that potential authority inherent in common ownership).

The only evidence presented at the hearing amounts to nothing. According to Taibi, Palker and Davis made statements across the bargaining table about DHL Express's willingness to provide additional funding to pay for Teamster benefits. Tr. 951, 965-66. That testimony was hearsay, Tr. 951, and there is no evidence to suggest that it was true.[20] To the contrary, as bargaining progressed, the Union realized that DHLNH's opposition to Teamster benefits had nothing to do with money and everything to do with its principled objection to being in union pension and health plans. Further, even assuming that DHLNH's representatives said across the table what Taibi claims, DHLNH had every reason to shift the blame on to DHL Express in order to pressure the Union into dropping its demands for Teamster pension and health.[21]

Nor can Local 251 establish common management between DHL Express and DHLNH. There is no dispute that Palker and Canaan ran the operations of DHLNH, and that company had its own field managers, including Ben Adkins, Tony Santiago and shift supervisors. DHLNH and NEF also had their own human resources professional based in New Hampshire. There is no overlap of this management with the management of DHL Express's operations.

---

[20] To the extent Local 251 seeks to use the hearsay testimony to prove the existence of a single or joint employer relationship, such logic is circular and cannot otherwise transform the hearsay statement into an admission by a party opponent. *See Airborne Express Co.*, 338 NLRB 597, 603 (2002) (testimony was hearsay and could not support conclusion that two entities were joint employers).

[21] Further, Taibi claims that an attorney for DHL, John Telford, asked him about the state of bargaining between DHLNH and Local 251 when they had a brief telephone conversation on the Friday before the strike about bargaining over the clericals. Tr. 978. Telford asked Taibi whether he had received DHLNH's latest offer, and about an hour later, Taibi received a call from Davis, in which DHLNH "attempted to add more money into the offer [but] would not commit to Teamsters health and welfare and he would not commit to a Teamsters pension." Tr. 979. Even if one assumes that Telford called Davis to encourage him put his best offer on the table, all that the evidence establishes is that DHL Express did not want a strike for fear of business disruption, not control over labor relations.

Because Local 251 cannot prove common ownership, common management or common control over labor relationships, it instead focuses on integration of operations. In its opening, and as described above, Local 251 characterized the relationship as "vertical integration." However, that term refers to "one entity" owning and controlling both the entity that produces and sells inputs and the entity that uses those inputs. *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 442 (2009). Obviously, that does not and could not describe the business relationship between DHL Express and NEF/DHLNH. But regardless of which term is used, integration of operations is one of four factors for determining whether two entities are a single employer, and no case stands for the proposition that integration alone can establish single employer status. *See Newspaper and Mail Deliverers' Union*, 271 NLRB 60, 67 (explaining that the Board weighs all of the factors and none is to be "considered in isolation").

Regardless, there is no integration of operations between DHL Express and DHLNH, as that term is defined by the Board. Local 251's entire argument rests on two facts: (1) that in receiving freight for delivery or picking up freight for delivery elsewhere, the two entities interact; and (2) DHL Express expects DHLNH to utilize its scanners so that it can track its customers' packages. Each of these facts is a necessary function of the services that DHLNH provides. In the case of deliveries, DHLNH is responsible for the last leg of a delivery in the PVD service area (getting the freight from DHL Express's network to the customer) and in the case of pickups, it is responsible for the first leg (getting the freight from the customer to DHL Express's network). No case suggests that this is integration of operations, let enough to establish single employer status. To the contrary, the Board has explained that commercial relationships to distribute product do not render the parties to that relationship integrated, let alone allies when one is involved in a labor dispute. *See Newspaper and Mail Deliverers' Union*, 271 NLRB at 67. Such a theory would

"repeal Section 8(b)(4) of the Act." *Id.* While Local 251 emphasized that DHL Express performs local delivery and pickups itself in other locations, its business decision to subcontract the function in PVD but not in some other locations is meaningless to whether it is a single employer at PVD.

Moreover, the purported interaction between the two entities is limited. The testimony establishes that the only regular interaction between DHLNH drivers and DHL Express was for a short period in the morning when inbound freight arrived. Even then, that interaction was with clerical agent Beth Stamp, a non-supervisor. Except for that brief period, the drivers are out on their routes, and Ms. Stamp spent most of her time upstairs at her desk or assisting customers at the counter window. Tr. 934, 1092-93. NEF and DHL Express employees might interact at Logan Airport in the morning or at MXG at night, but that interaction too was limited since Local 25 employees would handle the freight.

As to the use of scanners, the scanner was used to track packages, whether pickups or deliveries. In order to provide the local pickup and delivery services, the drivers needed access to DHL Express's package tracking system. While dispatch can send messages to a driver through the scanner, the messages were directly related to a delivery or pickup, such as a change in the delivery address, or at the behest of DHLNH. And as to messages sent by DHLNH, that occurred only because the drivers refused to continue what had been the practice to communicate via personal cell phones. None of this amounts to the type of integration of operations that the Board considers under the single employer test.

Nor is the fact that PVD is a shared facility material. Two companies are not allies by virtue of working at the same physical location. The Board has long recognized that multiple entities can perform work at a common situs, yet remain neutrals to each other's labor disputes. *See, e.g., Gen. Teamsters Local No. 126*, 200 NLRB at 254 (1972). Even in common situs cases,

picketing is presumptively unlawful if it is not "limited to times when the primary employer's employees are actually present at the common site." *Los Angeles Bldg. & Const. Trades Council*, 216 NLRB 307, 308 (1975).

None of the facts about PVD station alter these principles. It is undisputed that DHL Express employees used the front customer entrance to the facility, while DHLNH employees used the back entrance into the warehouse. Further, DHL Express employees parked in the front parking lot, while DHLNH employees parked in the back lot.[22] While both sets of employees have key fobs to the facility, the DHL Express employees had greater levels of access to the building than the DHLNH drivers. Tr. 1220-21. Similarly, DHL Express employees, including clerical agents, had access to the security cage — an area of the warehouse where packages are maintained securely — but DHLNH drivers did not. Tr. 1096, Further, although there is only one break room and one of set of restrooms, the drivers spent their time when at the facility primarily in the warehouse, while DHL Express employees spent most of their time in offices on the second floor.[23] Bethany Stamp testified that there is only one main telephone number to the station, but she admitted that Santiago did not have a landline phone in his office tied to that number, most calls were from customers, and that Santiago primarily used his cell phone for DHLNH business communications.[24] Tr. 1095-96.

---

[22] At the hearing, Local 251 made much of the fact that these parking rules were not followed during the strike, but there was a picket line at the facility every minute of the nine week strike. It is not surprising that vehicles parked where they could enter during the strike.

[23] Local 251 presented some blurry pictures of various posters on bulletin boards through Lee. Lee did not take the pictures and could not offer much explanation about them. The fact that there are two separate bulletin boards with the same employment law posters is consistent with the fact that there are two employers at the facility.

[24] Ms. Stamp also testified that UPS delivered the paychecks to the facility for DHLNH, and that she gives the unopened envelope to Santiago. Her receipt of a package from UPS is not evidence of integration of operations.

Taken together, DHL Express is not and was not a single employer with DHLNH and thus not an ally. In attempting to morph its franchisor-franchisee defense into a claim of integration of operations, Local 251 essentially seeks to create a new branch of the ally doctrine that does not exist, as it would undermine the purposes of Section 8(b)(4).

2. DHL Express Did Not Perform Struck Work

Nor has Local 251 established that DHL Express performed struck work. That branch of the ally doctrine requires proof that DHL Express performed "work that would have been performed by the primary's employees but for the strike." *United Mine Workers of Am., Dist. 2*, 334 NLRB 677, 686 (2001). Because the strike started in the morning of April 30 and the unlawful picketing at BOS began before 5 am the next day, Local 251 had to prove that DHL Express performed struck work during that window of less than 24 hours. *See Serv. Employees Int'l Union Local 525*, 329 NLRB 638, 641 (1999) (explaining that conduct that occurred after unlawful picketing cannot be used to justify that picketing). It presented no such evidence.

In its opening, Local 251 claimed that DHL Express provided drivers to DHLNH during the labor dispute. This appears to be a reference to Taibi's claim in his email to Local 25 that as of about 1:10 pm on April 30, 2018, DHL Express was supplying managers as couriers. No witness testified that this was actually true. Taibi acknowledged that he never saw any DHL manager drive a van that day. Nor did any other witness claim otherwise, although Maini, Rath and Lee were at the picket line that day and each testified at the hearing. Although the record is undisputed that the picket line was up all the time and Local 251 and the picketers took video and photos as vans exited the facility, Local 251 declined to present any such evidence, reinforcing the conclusion that Taibi's claim was false. The record evidence is that DHLNH performed its own struck work, as Palker was capable of drawing on employees from his other entities and locations in New England to serve as replacement workers.

The only evidence even arguably related to the performance of any work by DHL Express was that Lee took a picture of Marzelli loading a pallet with unknown contents into an unknown individual's truck. Tr. 916-17, 927-28; L251-43. Lee theorized that the individual was a customer, but admittedly did not know. Even assuming that Marzelli was assisting a customer (as Lee did at the hearing), it is undisputed that assisting customers who picked up freight at the facility was the work of DHL Express clerical employees, not the drivers. Tr. 1066-67. And it is undisputed that clerical employee Bethany Stamp was not on strike, but simply elected to not cross the picket line. Thus, Marzelli could not have been performing struck work. [25] *See Gen. Teamsters Local 959*, 266 NLRB 834, 838 (1983) (performance of non-unit work does not cause entity to lose neutral status).

Moreover, the evidence as to when Lee took that picture is unclear. Lee admitted that the picture could have been taken any day during the first week of the strike. Tr. 914-15, 924-25, 937 (admitting that his pictures of Marzelli must have been taken on different days since Marzelli is seen wearing different clothes). Local 251 could have clarified the timing of the incident by presenting the electronic date stamp for the picture or the text message attaching the picture from Lee to Simone, Local 251's organizer. T. 937. It declined to do so, and it is reasonable to infer that the omission was purposeful Thus, not only does the photograph not depict the performance of struck work, there is no evidence that it occurred prior to the picketing at BOS and MXG, and indeed, it likely happened after.

---

[25] To the extent that Local 251 somehow claims that picketing at BOS and MXG was permissible because freight destined for PVD or Manchester passes through those stations, that too cannot be evidence of ally status. The processing of that freight is bargaining unit work belonging to Local 25-represented DHL Express employees. By definition, it is not the performance of struck work.

To the extent that Local 251 seeks to rely on Lee's testimony that he observed freight being taken to the U.S. Postal Service in late May or June, Tr. 919-920, it is neither evidence of struck work, nor justification for what occurred weeks earlier on May 1. DHLNH has utilized the U.S. Postal Service to handle some deliveries prior to the labor dispute. Its continuation of that practice during the strike, even if increased, is not evidence of DHL Express performing struck work. *See Teamsters (Ind.) Local 810,* 131 NLRB 59, 71 (1961) (performance of same work during strike that it performed prior to the strike does not cause an entity to lose neutral status). Nor could an incident that occurred weeks (if not a month) after the unlawful picketing justify Respondents' conduct.

In its opening, Local 251 claimed that DHL Express provided vans to DHLNH during the strike. It presented no evidence that this is true. Lee testified that he saw some Budget vans with DHL Express DOT numbers in the parking lot at PVD. Nobody testified to ever seeing those vans used in the daily pickup and delivery operations. Again, the picket line was up 24 hours a day, 7 days per week, and Local 251 took pictures and video of vans as they entered and exited the facility. Presumably, if the Budget trucks had been used by DHLNH in pickup and deliveries, Local 251 would have presented evidence to that effect. Instead, Lee testified that the vans sat in the parking lot. That is not evidence of anything. *See Fein Can Corp*, 299 F.2d 635 (2d. Cir. 1962), *enforcing* 131 NLRB 59 (1961) (entity does not lose its neutral status by leasing automobiles and drivers to carry non-striking employees of the primary employer between a plant and a railway station because the neutral did not do struck work).

Lastly, Local 251 makes much of the fact that DHL Express maintained security at the facility during the strike. This too is not evidence of struck work. DHL Express maintains the lease for the facility and is responsible for the property. Its customers visit the station, and it has

an interest in ensuring that picketing is peaceful and that access to the facility is not impeded. While Local 251 theorizes that this also provided a benefit to DHLNH, that does not render DHL Express an ally. *See Carpenters Local 316*, 283 NLRB 81 (1987) (job site owner not an ally where it provided a job shack, electrical current, toilets and water to the primary on its job site, and purchased material for the primary); *Priest Logging, Inc.*, 137 NLRB 352, 353 (1962) (no ally relationship where struck employer diverts raw materials to a secondary because of the strike). Moreover, even if providing for security demonstrated that DHL Express cared about the strike, that too is meaningless. *See SEIU Local 525,* 329 NLRB at 640 (a neutral is not required to be totally disengaged from a labor dispute).

At bottom, Local 251 presented no evidence that DHL Express ever performed any work that would have been performed by the striking DHLNH employees but for the strike. *See United Mine Workers of Am., Dist. 2*, 334 NLRB 677, 686 (2001). Its affirmative defense that DHL Express acted as an ally should be rejected.

C. DHL Express Is Not And Was Not A Joint Employer

Local 251's claim that DHL Express is or was a joint of employer of the striking employees should be rejected. Until DHL Express filed a charge of unlawful practices against Respondents, Local 251 never claimed that DHL Express was a joint employer. It had abandoned that claim almost a year before, when it agreed that DHLNH was the only employer in the stipulated election agreement. It maintained that position in its filing of dozens of unfair labor practices charges against DHLNH, and then engaging in nine months of bargaining with that actual employer. Indeed, notwithstanding the litigation position it took in this case, Local 251 successfully negotiated a first contract with DHLNH — and only DHLNH. At every step of the way, Local 251 acknowledged that DHLNH was the employer, that any dispute was only with DHLNH, and that the genesis of the dispute giving rise to the strike and picketing was DHLNH's objection to

union benefit plans. While the Judge questioned whether the Union's subjective belief that DHL Express was not an employer of the drivers should be controlling, the Union should be bound by the position it took before the Board and in bargaining. A union should not be permitted to raise a joint employer defense after-the-fact when that defense never actually motivated it. *See, e.g., Goodyear Tire & Rubber Co.*, 312 NLRB 674, 689 (1993) (drivers never believed that they were jointly employed until the filing of charges and their subjective beliefs support conclusion there was no joint employment relationship).

Even if Local 251 could get out from under the position it took before the Board and in bargaining, the Board has never recognized a joint employer defense under these circumstances. The Board has never held that a joint employer claim is a valid defense to a Section 8(b)(4) violation where the alleged joint employer had no duty to bargain.

While DHL Express submits that the legal flaws in the joint employer defense should be the end of the issue, regardless, the facts presented at trial do not establish a joint employer relationship. Under either the traditional joint employer test requiring a showing of actual control over terms and conditions of employment by a putative joint employer or the test articulated in *Browning-Ferris*, the evidence presented at the hearing does not establish a joint employer relationship. Although Local 251 insisted at the outset of the case that DHL Express controlled every term and condition of employment in order to obtain thousands of pages of documents in response to its subpoena, it was later forced to retreat from that claim and acknowledge that DHLNH in fact set the terms and conditions of employment. While it then attempted to fit this case into *Browning Ferris*, the actual facts do not meet that standard. Accordingly, the defense should be rejected.

1. Local 251 Waived A Joint Employer Claim

Local 251 consciously and deliberately pursued a bargaining relationship with just DHLNH and should be barred from claiming that DHL Express is a joint employer now. Local 251 acknowledged that DHL Express was not an employer of the drivers in three separate contexts: (1) in the representation proceeding before the Board; (2) in unfair labor practice proceedings before the Board; and (3) in bargaining with DHLNH. As to the representation proceeding, a petition must contain "[t]he name of the employer," 29 C.F.R. § 102.61(a)(1), and while Local 251 initially named DHL Express as an employer of the drivers, it withdrew that claim during the representation proceeding. It entered into a Stipulated Election Agreement agreeing that DHLNH was the sole employer and then proceeded to an election.

Board law is clear that absent changed circumstances, a union is bound to a stipulation that a single entity is "the employer" of the unit. *Aldworth Co., Inc.*, 338 NLRB 137, 141 (2002); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 688 (1993). This is consistent with the general principle that parties may not relitigate issues which could have been litigated in a prior representation proceeding. *See Dollar Rent-A-Car*, 250 NLRB 1361, 1362 (1980); *The Wang Theatre, Inc.*, 365 NLRB No. 33 (2017). Applying this precedent, the Court of Appeals for the D.C. Circuit has repeatedly held that where a union stipulated that one entity was the only employer, it could not demand bargaining with another entity under a joint employer theory. *See Dunkin' Donuts Mid-Atl. Distribution Ctr., Inc. v. NLRB*, 363 F.3d 437, 440 (D.C. Cir. 2004) ("when a union, knowing the relationship between two companies, deliberately names only one of the companies in its representation petition and its stipulation for an election, and requests bargaining only with that company, it may not later substitute another company"); *Computer Assocs. Int'l, Inc. v. NLRB*, 282 F.3d 849, 852 (D.C. Cir. 2002) ("The Union offered no changed circumstances below and the Board found none. Accordingly, the Board had no ground to deviate

from the Union's stipulation of Cushman as the sole employer"). While these cases involved allegations that the alleged joint employer had a duty to bargain, the logic of these cases should apply here. Section 8(b)(4) of the Act is intended to protect neutrals from labor disputes that are not their own. By agreeing that DHL Express was not an employer, Local 251 acknowledged that DHL Express had no duty to bargain, effectively conceding DHL Express's neutral status, absent changed circumstances.

There are no changed circumstances here to release Local 251 from that stipulation. Local 251 implied at the hearing that it learned information during bargaining that caused it to change position. But Local 251 was cagey about what it knew at the time of the representation petition and offered no evidence as to what it learned during bargaining that it did not know at the time of the filing of the petition. Local 251 declined to have Simone, its "experienced" organizer, testify about why he identified DHL Express as a joint employer in the first instance and what he had learned about the employment relationship of the drivers during the organizing process. Indeed, Taibi's shifting testimony about why Local 251 dropped DHL Express as an employer on the petition demonstrates that Local 251's entire argument appears to have been manufactured as the hearing progressed. At the outset of the hearing, Taibi filed an affidavit under oath suggesting that Local 251 deliberately dropped DHL Express as an employer because DHL Express would not stipulate to an election. Apparently realizing that that story underscored that Local 251 knowingly dropped the joint employer claim, Taibi changed his story, claiming that Local 251 did not have sufficient facts to support a joint employer claim at the time of the representation proceeding. Local 251 cannot have it both ways, and the Judge should conclude that Taibi was not credible. Regardless, while Taibi's new explanation for abandoning the joint employer claim was intended to suggest that Local 251 learned additional facts as bargaining progressed, he offered no testimony

— let alone actual facts — to support such a claim. There is no reason to believe that whatever facts Local 251 claims to know now are different than the ones it knew at the time it withdrew the joint employer claim during the representation proceeding. Indeed, if the Judge were to credit Taibi's trial testimony, as opposed to his affidavit, the only conclusion is that Local 251 admits that DHL Express is not a joint employer.

If this were not enough, Local 251 engaged in additional conduct to reinforce the conclusion that it never believed what it now asserts here. Prior to the election, it filed charges of unfair labor practices solely against DHLNH. After it won the election, Local 251 filed more unfair labor practice charges against DHLNH as the employer, including claims that DHLNH had refused to bargain. Indeed, Maini testified that the filing of the unfair labor practice charges combined with the threat of 10(j) injunctive relief caused DHLNH to come to the bargaining table and take its bargaining obligations seriously. Thus, in dozens of unfair labor practice charges before the Board, Local 251 reiterated what it had agreed to in the Stipulated Election Agreement — that DHLNH was the sole employer of the drivers.

Lastly, Local 251 and DHLNH engaged in meaningful bargaining on all terms and conditions of employment. For nine months, they negotiated tentative agreements on a number of mandatory subjects. While they reached impasse and that impasse led to a strike, Local 251 admitted that the central obstacle to a contract was DHLNH's "objection in principle" to participating in Teamster health and pension plans. DHLNH and Local 251 ultimately reached a first contract on all of the typical terms and conditions of employment. An agreement was reached after the Union picketed Palker's house and let his neighbors know that he was a bad employer. That was a "game changer" for the dispute between the bargaining parties. These facts -- all of which are undisputed — demonstrate that DHLNH was the only employer and controlled all terms

and conditions of employment. *See Browning Ferris*, 362 NLRB No. 186, pp. 13, 15 (recognizing that a putative joint employer is only required to bargain over the terms it controls).

It is telling that one day before the picketing at issue in this case, Local 251's message remained the same — that its dispute was with the actual employer of the drivers, DHLNH. In its social media posts regarding the strike, it identified the employer as DHLNH, a subsidiary of NEF, and complained that DHLNH would not agree to Teamster benefits. Local 251's only mention of DHL Express was really about DHLNH — that it was an independent contractor and a subcontractor. Indeed, in his email to Local 25, in which Taibi falsely claimed that DHL Express was acting as an ally, Taibi never claimed that DHL Express was a joint employer. But regardless, Taibi's false claim of ally status demonstrates that Local 251 understood that DHL Express was a neutral to the labor dispute and that it needed some justification to extend picket lines to BOS and MXG.

During the picketing itself at BOS and MXG, Local 251 did not claim that DHL Express was a joint employer. Confirming the Union's secondary object, Maini explained that the picketing was intended to put pressure on DHL Express in order to have it in turn pressure DHLNH. In MXG, when McArdle began reading the prepared statement, the DHLNH picketers acknowledged the truth — there were no employees of DHL Express present.

Whether one characterizes these facts as waiver, estoppel or a course of dealing, the conclusion is ultimately the same — that the claim of joint employer has been manufactured by Local 251 in the course of this litigation. Until its defense of this case, neither Local 251 nor the drivers themselves believed that DHL Express was an employer for any purpose. In the representation proceeding, in its unfair labor practice charges, in bargaining and in the hours before the unlawful picketing in this case, Local 251 understood and acknowledged that the only

employer was DHLNH. Having deliberately pursued a bargaining relationship solely with DHLNH both before, during and after the strike, it cannot claim retroactively that DHL Express is a joint employer.

2. *The Joint Employer Claim Fails Because DHL Express Had No Duty To Bargain*

Even if Local 251 could get out from under its own admissions that DHL Express is not an employer, DHL Express cannot be a joint employer and thus a primary in a bargaining dispute in which it had no duty to bargain and was not bargaining. The "relevant inquiry" in defining primary activity is "whether the union's efforts are directed at its own employer on a topic affecting employees' wages, hours, or working conditions that the employer can control." *See NLRB v. International Longshoremen's Assn.*, 473 U.S. 61, 81 (1985). *See also NLRB v. Pipefitters*, 429 U.S. 507, 511 (1977) (explaining that analysis "turns on whether the boycott was addressed to the labor relations of the contracting employer").

Local 251 argues as if *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), created a new "joint employer" justification for Section 8(b)(4) conduct. But the majority made clear that its decision did not apply to issues under Section 8(b)(4). In response to the dissent's concern that the majority's decision meant that neutral parties normally protected from secondary union activity could be treated as employers and thus subject to picketing, the majority explained that "the prohibition on secondary boycott activity" was "not at issue" and that "our decision today does not modify any other legal doctrine . . . under the Act." 362 NLRB No. 186, slip op. p. 20 n. 120.

Rather, *Browning-Ferris* addressed under what circumstances an alleged joint employer can be named in a representation petition and, if the union is certified, have a duty to bargain. The majority in that case explained that a putative joint employer must possess "sufficient control over

employees' essential terms and conditions of employment to permit meaningful collective bargaining" and that if certified, the alleged joint employer is only "required to bargain over the significant terms of employment that it *does* control." 362 NLRB No. 186, at 2, 13 n.70 and p. 15. As to this latter point, the members of the *Browning-Ferris* majority explained a year later that an alleged joint employer, which is not a party to the representation certification, remains a neutral to the unit's bargaining disputes. *See Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 18 (2016), *citing M.B. Sturgis, Inc.*, 331 NLRB 1298, 1307 (2000). Taken together, *Browning-Ferris* and its progeny, regardless of their continued vitality, establish that an alleged joint employer has no duty to bargain and remains neutral where another employer is the only employer to the certification.

The facts of this case demonstrate why this has to be correct. Local 251 went on strike because DHLNH had "fundamentally" rejected being "associated" with Teamster benefit funds. At the time of the strike, Local 251 understood that this principled objection might mean that the actual bargaining parties would never reach agreement. It extended the picket lines to BOS and MXG, not because it believed that DHL Express had any control over those issues, but because DHL Express might exert business pressure on DHLNH. This is exactly the type of unlawful object that Congress sought to prohibit and *Browning-Ferris* did not disturb.[26]

The Board has never recognized a "joint employer" defense to Section 8(b)(4) conduct directed against an entity without a duty to bargain. While there is archaic precedent that jumbles together the terms "joint employer" and "single employer," those cases involve applications of

---

[26] If Local 251 claims that it was seeking to have DHL Express and DHLNH bargain together, not only is its position contrary to the evidence, but it also admits a violation of the Act. Under Section 8(b)(4)(A), a union "may not coerce employers into joining associations which negotiate labor contracts on behalf of their members." *Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. p. 9 (2016) (collecting cases).

what the Board now calls the single employer test. *See Carpenters*, 127 NLRB 900 (1960); *Teamsters, Local 559 (Atlanta Pipe Corp.)*, 172 NLRB 268, 272-73 (1968); *Teamsters Local No. 85*, 253 NLRB 632, 635-36 (1980); *see also Teamsters Local 557*, 338 NLRB 896, 897 n.3 (2003) (Member Liebman's concurrence) (citing to cases applying what is now the single employer test). The Board has never found that a union representing a certified unit can defeat a claim under Section 8(b)(4) by alleging that the secondary was in fact a joint employer, despite no duty to bargain.

3. The Joint Employer Claim Fails Because DHLNH Was The Only Employer

In any event, there is no evidence that DHL Express has sufficient control over any essential terms and conditions of employment to be a joint employer. Local 251's case rests on the test for joint employment which is set forth in *Browning-Ferris*. A majority of the Board has made clear that this not the appropriate test for joint employment. It expressly overruled *Browning-Ferris* in *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (2017), but that decision was vacated for reasons unrelated to the merits. 366 NLRB No. 26 (2018). Last month, a majority of the Board made clear that the test in *Browning-Ferris* should not be applied. *See Orchids Paper Products Co.*, 367 NLRB No. 33, slip op. p.4 n.14 (2018). Regardless, under either test, the joint employer defense should be rejected.

a. Local 251 Cannot Satisfy The Traditional Test For Joint Employment.

Local 251 all but concedes that it cannot satisfy the test overruled in *Browning-Ferris*. This is because there is no evidence that DHL Express actually controlled any term and condition of employment of the drivers. *See TLI, Inc.*, 271 NLRB 798 (1984). In fact, the evidence is overwhelmingly to the contrary. In terms of hiring, the undisputed evidence is that DHLNH decides who to hire. For example, Lee described that Santiago hired him back as a driver. Tr.

817-18. DHL Express does not interview candidates, does not pre-screen them and otherwise has no role in who DHLNH chooses to hire. Tr. 1223. DHL Express does not know what licenses the DHLNH employees have or whether an applicant passed or failed any background check or pre-employment drug and alcohol test. Tr. 1125, 1225-26, 1233-35. Indeed, DHL Express does not know whether NEF or DHLNH is doing any drug screening at all. *Id.*

NEF is responsible for training new employees. Tr. 1241. As Ms. Stamp explained, when a new driver starts, he or she receives training from another DHLNH driver on the road. Tr. 1088. Drivers are required to have dangerous goods training (formerly known as hazmat training), because that training is required by the government. Tr. 1099. At some point in time, the drivers obtained a CD for the hazmat training from a clerical agent, but currently, NEF is responsible for training its drivers regarding dangerous goods.

As to wages and benefits, DHL Express has no role in setting wages for new hires and has no idea what DHLNH pays its drivers. Tr. 1228. DHL Express has no involvement in determining overtime or premium pay for the drivers. *Id.* DHLNH maintains its own time clock in the facility and has its own payroll provider. Tr. 1229-30; *see also* Tr. 1091 (explaining that DHL Express clerical agents record their time in Kronos and not in the DHLNH time clock). DHL Express does not have access to or review the DHLNH payroll data. Tr. 1229-30. As to benefits, DHL Express plays no role in determining what benefits are provided by NEF or DHLNH to the drivers. Indeed, the strike and the bargaining history demonstrate that while union-represented DHL Express employees participate in Teamster health and pension plans, DHLNH provides its own benefits plans and insisted on maintaining them.

As to hours of work, DHL Express has no involvement in determining what hours DHLNH drivers should work. Tr. 1229. Nor does it play any role in determining whether or when drivers take meal or rest breaks. Tr. 1230.

As to the day-to-day operations of the pickup and delivery services, DHLNH supplies its own vehicles, is responsible for maintaining them, and is responsible for associated costs like insurance, maintenance and gasoline. Tr. 1223-26. DHL Express might learn of an accident, if for example, it impacted a delivery, but ultimately, DHLNH is responsible for accidents involving its vehicles and its employees. 1226-27. DHLNH decides how many employees to schedule on any particular day, Tr. 1247, and it decides which drivers should drive which routes. Tr. 1229. As Beth Stamp explained, DHL Express provides Santiago with a spreadsheet of the day's deliveries and pickups, but DHLNH decides how to staff the routes and the order of deliveries and pickups. Tr. 1097-98.

It is undisputed that DHLNH has and had its own managers on site at the facility to provide supervision of its drivers. The DHL Express manager, Glenn Marzelli, had limited interaction with the drivers themselves. He might say good morning to them, but he does not direct them to perform any task. Tr. 1230-31. Marzelli does not have the contact information for any DHLNH employees and has never used the dispatch system to send a message to a driver. Tr. 11220, 1231. He never participated in a ride-along with a DHLNH employee, and he does not have access to GPS data from any DHLNH vehicle. Tr. 1084, 1190, 1192, 1224-31; L251-79, pp. 4-5. Nor does he raise any customer complaints to them directly. Tr. 1231. As the customers complaints in evidence demonstrate, Marzelli forwarded any customer issue involving a driver to DHLNH or NEF management. Tr. 1231-32. It was then up to DHLNH or NEF management to address the situation. Tr. 1232-33.

As to discipline or discharge, Marzelli played no role in issuing discipline or discharge of any DHLNH driver. Tr. 1227-28, 1237-38. Nor has he ever directed Santiago or any NEF manager to take any action against any courier. Tr. 1238. Indeed, the disciplines in the record demonstrate that DHLNH managers decided when and for what reasons to issue discipline, precisely why Local 251's unfair labor practice charges were directed solely at DHLNH. At the hearing, Maini attempted to claim that Marzelli directed DHLNH to fire a driver who failed a criminal background check and threatened discipline to a driver who changed the background screen on his scanner to the Teamsters logo. However, Maini admitted that neither assertion was true. As to the discharge issue, Maini admitted that NEF's HR professional made the determination that the driver should be fired based on his criminal record.[27] Tr. 1124-25. Further, he never heard Marzelli threaten any DHLNH driver with discipline and admitted he was making an assumption. Tr. 1122.

At bottom, there is no evidence of any actual control by DHL Express over any terms and conditions of employment of the DHLNH drivers. To the contrary, the bargaining history between DHLNH and Local 251 establishes that DHLNH and its parent NEF controlled all of the essential terms and conditions of employment. DHLNH hired its own drivers, set their wages and benefits, made disciplinary and firing decisions, controlled the operations relating to the pickup and delivery services, determined hours of work, and heard grievances. The very fact that DHLNH and Local 251 reached agreement on a first contract covering all mandatory subjects of bargaining demonstrates DHLNH's control of all terms and conditions.[28]

---

[27] Maini's resistance to answer questions directly on cross-examination demonstrated an unwillingness to concede the truth and that his testimony was prone to exaggeration.

[28] Local 251 makes much of language in the agreement which references DHL Express. That language was the product of substantial back and forth between Local 251 and DHLNH. DHL Express had no role in the drafting of the language and was never consulted about it. If

Further, Marzelli's role vis-à-vis NEF and DHLNH was at the business-to-business level. He would communicate with NEF and DHLNH management about concerns and to the extent that those concerns related to drivers, it was up to DHLNH to manage its employees. For example, in a February 2018 email to NEF and DHLNH managers, Marzelli raised concerns about the propping open of a door to the facility. L251-80. As Marzelli explained at the hearing, the facility is regulated by the government because the freight goes on aircraft. TSA agents periodically visit and inspect access to the facility. Tr. 1166-67, 1222-23. While the issue obviously related to something the drivers were doing, Marzelli raised the issue to NEF management, and DHLNH acknowledged that "any directive we give employees comes from us not from [Marzelli]." L251-8. Similarly, Stamp testified that she observed Marzelli notifying Santiago that drivers were out of uniform or mishandling packages. Tr. 1082-83. But nobody testified that Marzelli told Santiago how to handle the situation. If anything, these interactions demonstrate what Marzelli testified to at the hearing -- that there was a limit to what he could do since the drivers were not his employees. Marzelli was limited to ensuring that the Cartage Agreement was followed, not directing the terms and conditions of employment of any of the drivers.[29]

The fact that the drivers wore DHL branded uniforms and utilized a DHL scanner to track packages does not render DHL Express a joint employer. The Cartage Agreement makes clear that the uniform requirement, as well as the NEF's use of DHL marks and coloring generally, serve as an advertising function for which NEF was compensated. More generally, because NEF and

---

anything, the language establishes only that Local 251 agreed that DHL Express was a "Customer" of DHLNH's services.

[29] Lee claimed that Marzelli handed him a key fob directly. Tr. 854. Marzelli testified that he does not issue fobs to the individual drivers. Tr. 1237. This testimony is not in conflict. Lee had been a manager at DHLNH, and he never claimed that the fob incident occurred when he was a driver, rather than a manager.

DHLNH are responsible for pickups and deliveries for customers in the Providence area, the branding requirement is about maintaining DHL Express's customer goodwill and brand recognition, not control over terms and conditions and employees. As to the scanners, DHL Express has to be able to track the packages that are being delivered or picked up in order to communicate with its customers.

In *Airborne Express*, 338 NLRB 597 (2002), the Board held on nearly identical facts that Airborne[30] was not a joint employer of drivers employed by a cartage company who had a contract with Airborne to provide pickup and delivery services in Providence. In *Airborne*, Local 251 filed a representation petition to represent drivers of one cartage company, Interstate, and won an election. When Airborne later terminated the cartage contract, the General Counsel alleged that Airborne was a joint employer and thus violated Section 8(a)(3). The judge assessed whether Airborne shared or codetermined the essential terms and conditions of employment, such as hiring, firing, disciplining, supervision and direction of employees. Interstate determined who to hire; what wages and benefits to offer; the number of routes to run; and whether and when to issue discipline or discharge employees. It had its own on-site supervisors, and day-to-day management of the drivers was carried out by them. While the drivers wore uniforms with Airborne logos, drove vans with those logos and used Airborne scanners, the judge found these facts irrelevant and concluded that "the evidence cannot establish that Airborne was, at any time, a joint employer with any of the cartage companies that it had contracted with to perform Rhode Island and southern Massachusetts services." 338 NLRB at 606. The Board affirmed that conclusion. *Id.* at 597.

---

[30] DHL Express bought Airborne, and the National Master Agreement originally had been with Airborne. Tr. 669, 692-93.

As in *Airborne*, the Judge should conclude that DHL Express is not and was not an employer of the DHLNH drivers. There is no evidence that it controlled any terms and conditions of employment. Indeed, Local 251 conceded as much at the hearing, explaining that there was no dispute that DHLNH "sets terms and conditions in Providence." Tr. 603.

b. The Joint Employer Claim Fails Under *Browning-Ferris*

Local 251 fares no better under the test set forth in *Browning Ferris*. In *Browning Ferris*, the then majority of the Board held that two or more entities may be joint employers if they share or codetermine matters governing essential terms and conditions of employment. 362 NLRB No. 186, p. 2. While this is the same standard that the Board had applied before, the majority took issue with prior decisions that ignored contractual language reserving to the "user employer" the power to dictate terms and conditions of employment. *Id.* at p. 10. For example, the majority criticized the decision in *TLI, Inc.*, 271 NLRB 798 (1984) as ignoring that the user employer had the contractual right to maintain operational control, direction and supervision over the employees in question. Similarly, the majority took issue with the decision in *Southern California Gas*, 302 NLRB 456 (1991), that the building management company dictated the number of employees, communicated specific work assignments and exercised ongoing oversight over job performance. *Id.* In the case of the *Airborne* decision, the majority did not question the application of the facts of that case or its holding. Nor did the majority suggest that Airborne had reserved power to dictate terms and conditions of employment. Rather, the majority in *Browning Ferris* disagreed with the Board's comment in a footnote that a putative joint employer's control must be direct and immediate. *Id.* It otherwise left undisturbed the analysis of the facts in *Airborne*.

Ultimately, the majority in *Browning Ferris* held that the Board should assess the degree to which two or more entities share the right to control terms and conditions and employment. *Id.*

at 15. However, the majority cautioned that a putative employer's right to "dictate the results of a contractual service or to control or protect its property" do not constitute indicia of joint employer status. *Id.* at 16. Further, the majority explained that the focus is only on matters that are "indisputably" subjects of bargaining, and that the decision did not fundamentally alter the law. *Id.* at p. 17 n.92, 20 n.120.

Although Local 251 claims that its argument is premised on *Browning Ferris*, it is not. Local 251 contends that because the Cartage Agreement sets minimum qualifications for drivers, that means that DHL Express has the power to make hiring decisions. While it is true that the Cartage Agreement requires that drivers meet certain minimum requirements, such as the ability to read English and the satisfaction of certain background and pre-employment drug and alcohol screening, the conclusion that this means that DHL Express maintain de facto control over hiring does not follow. In *Browning Ferris*, the key fact was that that BFI had the right to reject any worker that Leadpoint, the supplier employer, referred to its facility for any reason or no reason at all. *Browning Ferris*, 362 NLRB No. 186 at p. 18. Indeed, in that case, applicants were tested on BFI equipment and were required to meet specific productivity benchmarks. *Id.* Similarly, BFI retained the right to discontinue the use of any personnel assigned by Leadpoint. *Id.* Here, DHL Express retains no such rights under the Cartage Agreement. It has no right to reject any driver chosen by DHLNH, either at the hiring stage or thereafter.

Moreover, the qualification standards are intended to ensure that in performing the services, NEF and DHLNH comply with the law and that DHL Express receives the services for which it is paying. Neither rationale demonstrates reserved control under *Browning-Ferris*. As to legal compliance and as the Cartage Agreement acknowledges, the services in question — local pickup and delivery of international freight — are heavily regulated. The operation of commercial

motor vehicles is regulated by the Department of Transportation, including mandatory drug and alcohol testing of drivers. *See* L251-74, Section 4.2.2 (citing to various Department of Transportation regulations relating to commercial motor vehicles). Further, because of security and safety risks associated with air cargo, the facility and its operations are subject to rules relating to the transportation of hazardous materials, the Aviation and Transportation Security Act and the U.S. Customs and Border Protection's C-TPAT program. *Id.* at Section 4.2.7. This latter program is a public and private partnership to improve cargo security. *See, e.g.*, https://www.cbp.gov/border-security/ports-entry/cargo-security/ctpat.

As the Cartage Agreement makes clear, the requirement that NEF maintain drug and alcohol screening is intended to comply with federal law.[31] *See* L251-74, Section 3.4.3. Similarly, the background check requirement is intended to ensure that drivers do not have a revoked or suspended drivers' license, do not present a security risk, and do not present a risk to customers or the public. *Id.* at 3.4.4. The Cartage Agreement also expects NEF to comply with the Immigration Reform and Control Act of 1986 by requiring that drivers be authorized to work in the United States. Lastly, the Cartage Agreement requires a driver to have "the appropriate type of driver's license." Requiring a contractor to comply with the law cannot constitute an indicia of joint employment. *See, e.g., Aldworth Co., Inc.*, 338 NLRB 137, 139 (2002) ("Contrary to the judge, we find that actions taken pursuant to government statutes and regulations are not indicative of joint employer status").

Beyond what is legally required, the remaining qualification standards relate only to ensuring that NEF is able to provide the services in accordance with the Cartage Agreement. For

[31] As to post-hire drug and alcohol testing, the Cartage Agreement provides that it shall not apply if it conflicts with applicable law. *Id.* Rhode Island law limits post-hire drug testing, *see* R.I. Stat. § 28-6.5-1, and there is no evidence that NEF or DHLNH conducted any post-hire drug testing.

example, the Cartage Agreement requires that drivers be able to read and write English. Obviously, a driver must be able to read information about a package in order to deliver it. Other than that, the Cartage Agreement provides that a driver is expected to possess "such competence" and "qualifications" necessary to provide the services. *See* L251-74, Section 3.4.3. Not only is that language vague, but it underscores that NEF is responsible for determining who meets those standards. Unlike in *Browning Ferris*, DHL Express has not retained the right to second-guess NEF's judgment in that regard.

The same is true as to the language in Exhibit C of the Cartage Agreement requiring that drivers act courteously and professionally towards customers. The Cartage Agreement recognizes that both NEF and DHL Express have a "mutual goal" of achieving customer satisfaction. *See* L251-74, Section 3.13. An expectation that drivers further that goal does not mean that DHL Express has reserved for itself the right to police whether individual drivers did or did not meet that expectation.

Rather, DHL Express's rights were to assess NEF's performance under the contract as a whole. Marzelli's handling of customer complaints reflects this reality. He would forward the complaints to NEF management. But he did not direct NEF on how to respond to any individual complaint or take any action against a driver. The record reveals that when he received multiple complaints about the same issue, he would offer guidance about how to reduce the complaints, but again left it to NEF to determine how to handle the matter. Similarly, when asked to assess NEF's performance in February 2018 in connection with possible contract renewal, his email outlining his concerns reflected an assessment of the overall service quality. Marzelli's frustrations about that service quality demonstrate DHL Express did not and does not have the type of reserved control that the Board focused on in *Browning-Ferris*.

Similarly, DHL Express has not retained the power to effectively fire any driver, as was the case in *Browning-Ferris*. In that case, BFI reserved the right to reject any worker or discontinue the use of any worker assigned by Leadpoint. 362 NLRB No. 186, at p. 22. Further, BFI exercised that power by "request[ing] the[] immediate dismissal" of employees in two incidents. *Id.* The Cartage Agreement includes nothing like the language in that case, and there is no evidence that DHL Express has demanded the removal of any driver. Because the record is against it, Local 251 attempts to bootstrap language in the lease between DHL Express and the landlord on to the Cartage Agreement to argue that DHL Express could remove a driver from the facility. The Union's need to mash together two different agreements between different contracting parties exposes the weakness of its position. There is nothing in the lease to suggest that it puts a gloss on NEF's right to choose and maintain its own employees.

Further, the record is devoid of any language to suggest indirect control over other employment terms and conditions. In *Browning-Ferris*, the Leadpoint employees worked all day in the same facility as the BFI managers, who continuously monitored the Leadpoint employees and had in "numerous instances [] communicated detailed work direction to employees." BFI provided Leadpoint "with a target headcount of workers needed" and also specified "where Leadpoint workers [were] to be positioned." Leadpoint had "no input on shift schedules," while BFI controlled when the Leadpoint employees could "take breaks" and decided whether work would be performed on an overtime basis; and BFI "set productivity standards" and the "pace of work." 362 NLRB No. 186, slip op. pp. 5-7, 23.

Nothing like that exists here. DHLNH decides how many employees to have and their hours of work, and monitors employees' productivity.[32] The drivers spend most of their day on the road and are supervised by NEF managers. Marzelli has never done a ride-along, does not meet with the drivers, and has never directed any DHLNH employee to perform any work task. The only evidence to the contrary is that Lee claims that in a single instance, Marzelli sent him an email about the delivery of package. However, Lee admitted on cross-examination that he never had an email address when he was a driver. Tr. 929. Consistently, Marzelli testified that he did not have email addresses for the drivers or otherwise maintain their contact information. Tr. 1220. Putting aside how Lee could have received an email without an email address, that purported single incident is not enough to establish joint employer status. The fact that Local 251 could only present one incident from any of its witnesses — including driver Rath and Maini who visited the facility daily — further demonstrates the weakness of its case.

At the hearing, Local 251 also suggested that DHL Express had de facto control by virtue of what it referred to as "funding the contract" — that by paying more to NEF under the Cartage Agreement, DHLNH could then offer more at the bargaining table. This argument too fails under *Browning Ferris*, as the Cartage Agreement includes none of the provisions that the *Browning-Ferris* majority suggested could be relevant to joint employment status. In that case, the Board specifically noted that "BFI and Leadpoint are parties to a cost-plus contract under which BFI is required to reimburse Leadpoint for labor costs plus a specified percentage markup." 362 NLRB No. 186 at p. 19. The majority explained that this arrangement coupled with a "requirement" that

[32] Local 251 suggested that DHL Express would not want packages delivered at 2 am. The absurdity of the example demonstrates the weakness of its case. DHL Express's expectation that pickup and delivery services occur during regular business hours is nothing like the "core staffing and operational decisions that define all employees' work days" that existed in *Browning-Ferris*.

BFI approve any wage increases established that BFI had meaningful control over wages. *Id.* Neither provision exists here. The Cartage Agreement is not a "cost-plus" arrangement, as NEF receives a fixed weekly payment plus flat rates for each piece delivered and picked up and for each stop. CP-24; Tr. 1246. Not only are the payments not tied to NEF"s labor costs, but it has no right to any adjustment in the fees. Further, the Cartage Agreement makes clear that NEF sets employees' wage rates and it is not required to obtain DHL Express's approval over wage increases. Thus, nothing about the economic terms of the Cartage Agreement supports Local 251's joint employer claim.

In claiming otherwise, Local 251 argues, not for joint employment under the test set forth in *Browning-Ferris,* but for the "underlying economic facts" standard Congress rejected. In *NLRB v. Hearst Publications,* 322 U.S. 111 (1944), the Supreme Court approved the Board finding employment based on "underlying economic facts" — that newsboys' "total wages" were "influenced in large measure" by the publishers, and that "[m]uch of their sales equipment and advertising materials [was] furnished by the publishers with the intention that it be used for the publisher's benefit." 322 U.S. at 129, 131–32. Local 251 would have the Judge conclude that DHL Express is a joint employer because what it pays NEF might impact how NEF pays its employees.[33] Congress rejected such an approach, *see NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968), and for good reason. If it were otherwise, every commercial relationship, in

[33] Even so, the underlying economic reality here is that NEF is the primary provider of capital and exercises its contractual discretion in accordance with its own economic incentives. It is responsible for the relevant capital, the operating costs of employing its employees and its employees using its vehicles. As it is paid the same amount regardless of how it exercises its discretion over the employment of its employees and operating costs, it has meaningfully distinct economic incentives from DHL Express.

which one entity pays a fee for services, could be joint employment. Such a conclusion would eviscerate the protections of Section 8(b)(4).

What Local 251 calls "influence" and "ability to control" is nothing more than a description of why unions engaged in secondary picketing before the Taft-Hartley Act, and why the conduct was made an unfair labor practice. Congress recognized that business partners could intercede in each other's labor disputes, and prohibited secondary activity for precisely that reason: "It was Congress' belief that labor disputes should be confined to the business immediately involved and that unions should be prohibited from extending them to other employers." *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 703–04 (1951) (quoting *Carpenters*, 81 NLRB 802, 812 (1949)).

In sum, under either the *Browning-Ferris* test or the test that case rejected, DHL Express was not a joint employer. It did not exercise actual control over terms and conditions of employment, nor did it reserve the right to exercise such control. Local 251's affirmative defense should be rejected. Local 251 sought and obtained thousands of pages of documents from DHL Express in connection with its joint employer defense. The paucity of the record demonstrates what DHL Express has always insisted — that the joint employer defense was manufactured after-the-fact to justify Respondents' illegal conduct and based upon nothing more than the fact that the drivers wear DHL Express branded uniforms, drive DHL Express branded vans and deliver and pickup DHL Express packages. That is a legitimate commercial relationship, not joint employment.

D. The De Minimis Defense Should Be Rejected.

Lastly, Local 251 contends its illegal conduct should be excused as de minimis. This is not a valid defense. Any amount of "unlawful picketing" is, in fact, unlawful. *Shopmen's Local Union No. 455*, 243 NLRB 340, 349 n. 24 (1979). "T]he Supreme Court has made clear that

'picketing is qualitatively 'different from other modes of communication.'" *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB 797, 802 (2010). Thus, "[t]here is no requirement that picketing continue for any specific period of time before it can be deemed unlawful within the meaning of Sec. 8(b)(4) of the Act." *Shopmen's Local Union No. 455*, 243 NLRB at 349 n.24; *see also Local 2208 IBEW*, 285 NLRB 834, 834 (1987) (one hour of picketing violated 8(b)(4)(i) and (ii)(B)). Moreover, the fact that the picketing did not occur beyond May 1, 2018 is likely attributable to Respondents' decision to enter into a stipulation to cease and desist such unlawful picketing on threat of a 10(l) injunction.

IV. Local 25's Contractual Arguments Are Without Merit

At the hearing, the Judge struck Local 25's defense that the allegations against it should be deferred to the grievance and arbitration provisions of the National Master Agreement, recognizing that the Board does not defer Section 8(b)(4) allegations. Undeterred, Local 25 nonetheless contends that the allegations in the case relating to the picketing is a contractual matter regarding employees' rights to honor a picket line. This argument is absurd. The issue before the Judge is whether Local 25, by its agents, violated the Act. That does not require an interpretation of the National Master Agreement, nor a determination of whether the suspensions issued by DHL Express to its employees for the work stoppage was permissible under that contract.

Nothing in the National Master Agreement limits the ability of DHL Express to file an unfair labor practice, and Local 25 cannot prevent the General Counsel from prosecuting unfair labor practices under Section 10(a) of the Act. *See* 29 U.S.C. § 160(a). While the National Master Agreement imposes certain affirmative obligations on the TDHLNNC and Local 25 in the event of an unauthorized work stoppage, *see* GC-20, Article 7, Section 10, that language does not render the question of whether Respondents violated the Act a contractual defense. That would only be true if DHL Express had waived the protections of Section 8(b)(4)(B) of the Act in the contract.

However, Section 8(e) of the Act makes it unlawful for employers to waive the protections of Section 8(b)(4)(B) of the Act by contract. For this reason, contractual defenses such as deferral are not available defenses to conduct that would otherwise violate Section 8(b)(4)(B), *see Road Sprinkler Fitters Local Union 669,* 365 NLRB No. 83, at 1 n.3 (2017), an arbitrator is not authorized to determine whether a union engaged in a secondary boycott, *see Ironworkers Dist. Council of the Pac. Nw. (Hoffman Constr.),* 292 NLRB 562, 578 (1989), and a grievance resting on a theory that the conduct is privileged by the contract is itself unlawful. *Int'l Union of Elevator Constructors (Long Elevator & Mach Co.)*, 289 NLRB 1095, 1095 (1988).

Nor does resolution by an arbitrator of the grievance relating to the suspension resolve the unfair labor practice allegations presented here. The issue at the arbitration will be whether DHL Express violated the National Master Agreement by issuing the suspensions, and the arbitrator will answer whether there was an "unauthorized work stoppage" within the meaning of the contract. The arbitrator will not answer whether Local 25 or its agents engaged in conduct that violated the Act.

In any event, as a matter of law, Local 25 cannot look to the collective bargaining agreement for a defense. Local 25 violates Section 8(b)(4)(ii)(A) of the Act by even pursuing a grievance that is predicated on a theory that DHL Express entered into an agreement that would effectively allow DHL Express employees to withhold services in furtherance of another union's bargaining goals with another employer. *See Int'l Union of Elevator Constructors (Long Elevator & Mach. Co.),* 289 NLRB 1095, 1095 (1988). Thus, as a matter of law, Local 25 is wrong that whether Local 25 violated the Act can be a "contract dispute" and Local 251 is wrong that arbitration can resolve anything relevant about what "right" Local 25 had to induce or encourage its members to engage in a work stoppage. *See Road Sprinkler Fitters Local Union 669,* 365

NLRB No. 83, slip op. at 1 n.3 (2017) (denying a union's request for deferral and noting that "allegations of secondary pressure under the Act . . . are not well suited to resolution by arbitration"); *Ironworkers Dist. Council of the Pac. Nw. (Hoffman Constr.),* 292 NLRB 562, 578 (1989) (upholding ALJ decision that an arbitrator is not authorized to determine whether a union engaged in a secondary boycott).

CONCLUSION

For the foregoing reasons, DHL Express respectfully requests that the Judge conclude that Respondents violated the Act as alleged and grant such other and further relief as the Judge deems just and proper.

Dated: December 18, 2018

Respectfully submitted,

DHL EXPRESS (USA), INC.,

By its attorneys,

Robert A. Fisher
Skelly Harper
SEYFARTH SHAW LLP
Seaport East
Two Seaport Lane, Suite 300
Boston, MA 02210
TEL: (617) 946-4800
FAX: (617) 946-4801
rfisher@seyfarth.com
nharper@seyfarth.com

CERTIFICATE OF SERVICE

I hereby certify that I e-filed this document through the Agency's website and e-mailed a copy to counsel for Respondents Local 251, Marc Gursky (mgursky@rilaborlaw.com), counsel for Respondent Local 25, Michael Feinberg (maf@fczlaw.com), and counsel for the General Counsel, Colleen Fleming (colleen.flemming@nlrb.gov) on this 18th day of December, 2018.

Robert A. Fisher